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In The
Supreme Court of the United States

MICHAEL GOLIGHTLY, JOE CARTER, W. HAYS GILSTRAP, JOE MELTON, SUE E. CHILTON, LINDA MELKER and DUANE R. SHROUFE,

Petitioners,

v.

LAWRENCE MONTOYA, FILIBERTO VALERIO and CAROLE JEAN TAULMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in regulating the hunting of wild animals, Arizona's scheme to prefer residents in drawing for a limited number of permits to hunt bull elk and antlered deer is a regulation of interstate commerce so as to subject such state action to strict scrutiny analysis under the negative Commerce Clause?

PARTIES TO THE PROCEEDING BELOW

Defendants-appellees in the Court of Appeals were Dennis Manning, Michael Golightly, Herb Guenther, William Berlat and M. Jean Hassell, members of the Arizona Game and Fish Commission, and Linda Melker and Duane R. Shroufe, respectively employee and director of the Arizona Game and Fish Department.

Several of those named above have ceased to hold office. The petitioners in this Court are the current members of the Arizona Game and Fish Commission, viz., Michael Golightly, Joe Carter, W. Hays Gilstrap, Joe Melton and Sue E. Chilton. Linda Melker and Duane R. Shroufe, respectively employee and director of the Arizona Game and Fish Department, are also petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Golightly et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 301 F.3d 985 (9th Cir. 2002) and is reproduced at Appendix 1-26 ("App.__"). The decision and order of the United States District Court for the District of Arizona is unreported and is reproduced at App. 27-63.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals was entered on August 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."

Section R12-4-114(E) of the Arizona Administrative Code provides that the Arizona Department of Game and

Fish shall ensure that no more than ten percent of the total available hunt permit-tags are issued to nonresidents for the following hunts, except that when hunt numbers have ten or less available hunt permit-tags, no more than one hunt permit-tag is issued to a nonresident: (1) All hunts for bull elk, and (2) All hunts for antlered deer north of the Colorado River.

Arizona by statute prohibits sale of the meat of lawfully taken wildlife. Ariz. Rev. Stat. § 17-309(A)(2). The sale of heads, horns, antlers, hides, feet or skin of wildlife lawfully taken is permitted by Arizona statute. Ariz. Rev. Stat. § 17-371(E).

STATEMENT OF THE CASE

Extirpation of the Merriam elk, once found in large numbers in the White Mountains of eastern Arizona, began with the arrival of settlers in the Arizona Territory in the early 1870s. Elk meat, hides and ivories were hunted commercially, and the meat became a common commodity at trading posts and general stores. The last survivor of the largest of cloven-footed game animals of the Territory was recorded killed near Mount Ord in 1898. App. 3; Exhibits A, B, Defendants' Statement of Material Facts.

In 1913, the year after statehood, seventy Wapiti elk corraled near Gardner, Montana, were transported to Arizona and transplanted through the efforts of the State and private citizens and organizations. Released near Winslow, the transplanted elk formed the base stock for the Sitgreaves herd, by 1940 the largest elk herd in the southwest. Exhibit A, Defendants' Statement of Material

Facts. The court of appeals observed that Arizona is now home to some of the best elk and deer hunting in the world, exemplified by world record trophy animals. App. 3.

The court of appeals observed also that the part of Arizona north of the Colorado River, known as the "north Kaibab" and "Arizona strip," is a particularly scenic area renowned for its trophy elk and deer populations. App. 3. According to the court of appeals, "The quality of hunting in Arizona is in large part a result of the conservation efforts supported by Arizona citizens and administered by the Arizona Department of Game and Fish." App. 3. "It is undisputed," said the court of appeals, "that Arizona's game supply is limited and that its continued vitality is a product of the State's conservation efforts." App. 19.

Bull elk and antlered deer may not legally be hunted in Arizona without a valid permit-tag issued by the Department of Game and Fish ("the Department"). Ariz. Rev. Stat. § 17-332(A). Because of the great demand for the opportunity to hunt a bull elk, as well as antlered deer in the north Kaibab, the number of permit-tags in those hunts must be limited, and the Department has for many years employed a drawing to allocate the limited number of hunt permit-tags. Rule 12-4-114(E) of the Arizona Administrative Code, adopted in 1991, provides that no more than ten percent of the available permit-tags for hunting bull elk throughout the State or for hunting antlered deer north of the Colorado River may be issued to nonresidents.

The Random Draw in the Challenged Hunts. The Department implements the allocation of permit-tags and the ten percent nonresident cap through a random draw system. When any individual applies for a permit-tag for a

particular species for a hunt area, a computer assigns the application a random twelve-digit number, the lowest numbers being successful in the draw. Bonus points are earned by an applicant who is unsuccessful in a prior year's drawing for the given species and also by an applicant who successfully completes an approved hunter education course. If any applicant has bonus points, the computer assigns the application as many additional random twelve-digit numbers as there are bonus points. Thus, if an applicant has three bonus points, the computer assigns one random number for the application and three random numbers for the bonus points. However, the applicant with bonus points ultimately has only one random number in the draw, for the computer identifies the lowest random number of those assigned to the application and that number enters the draw. Exh. I, ¶6, Defendants' Statement of Material Facts (Affidavit of Linda Melker) ("Melker Aff.").

The random selection potentially consists of three separate draws for each animal species in each hunt area. The first draw identifies a set aside for applicants with bonus points. A maximum of ten percent of permit-tags for a hunt area is awarded to applicants with the most bonus points. There is no cap on nonresidents for this draw. The second draw is the applicants' first and second choices draw. For each hunt area, the computer determines which application has the lowest random number and assigns a permit-tag to that applicant. The process continues until all permit-tags for that hunt area have been assigned. In theory, there is a third draw which is the third, fourth, fifth and sixth choices draw, used to allocate permit-tags if any remain for the hunt area. Because of the high demand for permit-tags, there has been no third draw for bull elk

statewide or antlered deer in the north Kaibab for several years. Melker Aff., ¶6.

Concerning the ten percent cap for nonresidents, once a random number of a nonresident applicant is identified as the next lowest random number, the computer determines whether ten percent of the available permits, including permits based on bonus points, has already been assigned to nonresident applicants. If such is the case, the nonresident is not issued a permit-tag. Melker Aff. ¶6; App. 32.

In the District Court. Challenging the ten percent nonresident cap under the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution, plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343. Each of the three individual plaintiffs, residents of New Mexico, has worked in the guiding and outfitting business for over ten years, and each has applied unsuccessfully in Arizona for both bull elk and antlered deer hunt permit-tags in past years and wishes to apply in the future. Plaintiffs did not argue in the district court or in the court of appeals that Arizona regulation 12-4-114(E) discriminates against interstate commerce with respect to their guiding and outfitting business.[1]

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[1] Individual plaintiffs are employees of United States Outfitters, Inc., a guiding and outfitting business for hunters. Originally a plaintiff in the district court, United States Outfitters, Inc. was dismissed as a plaintiff for lack of standing. District Court Opinion and Order, App. 54, n.5. Similarly, Conservation Force, Inc. was originally a plaintiff in the civil action filed on February 10, 1998. Thereafter, Conservation Force, Inc. was dropped from the third amended complaint filed in district

(Continued on following page)

The district court first assessed plaintiffs' standing against the argument of the State that plaintiffs had suffered no injury from application of Arizona regulation 12-4-114(E). In each past drawing in which plaintiffs had been unsuccessful, the State had identified plaintiffs' assigned random numbers and pointed out that plaintiffs' individual lack of success in each drawing did not result from application of the ten percent cap on nonresident permit-tags. Instead, plaintiffs' lack of success in the drawings resulted from the fact that the demand was so great, and plaintiffs' random numbers were so high, that the available permits were assigned to resident and nonresident applicants with lower numbers. Applying *Northeastern Florida Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), the district court found that, while the odds of plaintiffs being subject to the ten percent nonresident cap are low given the demand for permits, the prospect of this happening is not "hypothetical." The district court held that standing exists because plaintiffs' injury in fact resulted not from the lack of success in obtaining a permit-tag, but from plaintiffs' inability to compete with resident applicants on an equal footing. District Court Opinion and Order, App. 36-45.

On the merits, the district court granted defendant state officials' cross-motion for partial summary judgment on the Commerce Clause claim. The district court found that Arizona does not allow commercial hunting of bull elk and antlered deer and that hunting of these animals in

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court on July 7, 1999, and plaintiffs' notice of appeal does not specify Conservation Force, Inc. by name or otherwise identify it as a party taking the appeal.

Arizona is recreational hunting. App. 55. Reading together *Baldwin* v. *Fish and Game Commission*, 436 U.S. 371 (1978), and *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), the district court concluded that "[w]hile harvested game can be an article of commerce and thus be subject to the strictures of the Commerce Clause, the recreational hunting of unharvested game is not commerce subject to that constitutional provision." App. 53. The district court also determined that the ten percent cap does not impose any incidental burdens on interstate commerce. App. 62. Plaintiffs subsequently dismissed voluntarily all remaining counts of their complaint and appealed the Commerce Clause ruling.

In the Court of Appeals. On appeal, the Ninth Circuit reversed. The court of appeals did not determine that hunting of elk and deer is commerce or that Arizona rule R12-4-114(E) regulates a commercial activity. According to the court of appeals, even if the regulated activity is not itself a form of interstate commerce, interstate commerce may still be affected and therefore subject to the Commerce Clause. App. 12, n.7.

Working from that premise, the court of appeals determined that the cap on nonresidents substantially affects the interstate flow of people and the interstate flow of goods in commercial markets. App. 13. The interstate flow of goods is affected, according to the court of appeals, because plaintiffs ultimately have a commercial purpose in seeking to engage in recreational hunting, viz., selling nonedible parts of any animals taken. "By disadvantaging nonresident hunters who seek to engage in this commercial pursuit, Arizona burdens interstate commerce at its point of supply." App. 14. Holding the negative Commerce Clause applicable, the court of appeals reversed and

remanded to the district court to determine whether the State could "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." App. 21, 26.

REASONS FOR GRANTING THE WRIT

1. Hunting of Elk and Deer in Arizona Is Not Commercial Activity, and the Extension of Strict Scrutiny Analysis to Regulation in This Area of Traditional State Concern Is Contrary to Decisions of This Court That Wildlife Becomes an Article of Commerce Only When Lawfully Reduced to Possession.

The court of appeals did not disturb the district court's finding that hunting of bull elk and antlered deer is recreational hunting. Nor did it determine that hunting of bull elk and antlered deer is commercial activity. Indeed, throughout its opinion the court of appeals refers to Arizona's interest in "maintaining recreational hunting opportunities for its citizens" in describing the challenged nonresident cap. App. 2, 18, 21, 24, 26.

According to the court of appeals, the Commerce Clause is implicated even though the regulated activity is not a form of interstate commerce if the state regulation substantially affects interstate commerce: "Contrary to the district court's finding, even if the regulated activity is not itself a 'form of interstate commerce,' it may still substantially effect [sic] interstate commerce and therefore be subject to the Commerce Clause." App. 12, n.7. The court of appeals' view is wrong because lawful reduction of wildlife to possession, from which commercial activity may

then result, is a necessary predicate to Commerce Clause applicability.[2]

In *Geer* v. *Connecticut*, 161 U.S. 519 (1896), a Connecticut ban on the interstate transport of game birds captured in that State was sustained by the Court on the ground that the State owns its wild animals and is thus free to qualify any ownership interest in the persons who capture them. Justices Field and Harlan dissented, Justice Field pointing out that the game birds roam at large and are the property of no one, but reduced to possession, they became an article of commerce subject to the Commerce Clause. 161 U.S. at 541.

The *Geer* dissenters "increasingly prevailed in subsequent cases." *Hughes* v. *Oklahoma*, 441 U.S. 322, 329 (1979). *Geer* was distinguished in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928), on the ground that ownership could not be qualified by the state once wildlife was destined for interstate commerce. The Court in *Foster-Fountain* struck down a statute prohibiting transport of shrimp until after removal of the head and shell at which time the taker or possessor would acquire title and the

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[2] Congress has power under the Property Clause of the Constitution, Art. IV, Section 3, Clause 2, to regulate taking of wild animals on lands owned by the federal government. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). Despite such power, Congress has expressly reserved state authority and responsibility to regulate hunting on most federally owned lands. *E.g.*, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (BLM lands and national forests); Conservation Programs on Government Lands, 16 U.S.C. § 670h(b) (public domain, national forests, military reservations, NASA and DOE, formerly AEC, lands); Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1284(a); Wilderness Act of 1964, 16 U.S.C. § 1133(d)(7); Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528 (national forests).

right to sell and ship beyond state limits. "As to such shrimp," the Court declared, "the protection of the commerce clause attached at the time of the taking." 278 U.S. at 13.

In *Hughes*, the Court struck down as a violation of the negative Commerce Clause an Oklahoma statute prohibiting shipment outside the State of natural minnows procured within the State. The Court in *Hughes* overruled *Geer* v. *Connecticut*, expressly endorsing the reasoning of the *Geer* dissenters that "[w]hen any animal . . . is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." 441 U.S. at 329.

While *Hughes* held that the negative Commerce Clause was applicable because the minnows had become an article of commerce, the Court in *Baldwin* v. *Fish & Game Commission*, 436 U.S. 371 (1978), held that hunting of elk is not a fundamental right for purposes of the Privileges and Immunities Clause. "Elk hunting by nonresidents in Montana is a recreation and a sport. . . . It is not a means to the nonresident's livelihood. The mastery of the animal and the trophy are the ends that are sought." 436 U.S. at 388.

Instead of determining that hunting in the instant case is of a commercial character, the court of appeals sought to distinguish the Arizona hunt from the hunting of elk in *Baldwin* on the ground that Arizona by statute permits the nonedible parts of lawfully taken bull elk and antlered deer to be sold. App. 14. But it is hard to see how that feature brings the Commerce Clause into play here,

for at the very point at which the protections of the Commerce Clause attach, that is, when elk and deer are lawfully reduced to possession, Arizona law treats resident and nonresident hunters equally.

As understood at common law, possession is a conception only less important than contract. O. W. Holmes, Jr., *The Common Law* 206, Little Brown & Co., Boston (50th Prtg.) To gain possession, one must stand in a certain physical relation to an object and the rest of the world, and must have a certain intent. *Id.*, at 216.[3] Bypassing reduction to possession, which was the Commerce Clause predicate for the dissenters in *Geer* and for the Court in *Hughes* and *Foster-Fountain*, the court of appeals proceeded directly to an examination of effect on interstate commerce of the Arizona hunting regulation.

The court of appeals found that substantial effects were present, both as to the interstate flow of people and the interstate flow of goods in commercial markets. App. 13. According to the court, the interstate flow of people is substantially affected by the nonresident cap because "hunting in Arizona promotes interstate travel of people, like the plaintiffs, who want to take advantage of Arizona's excellent hunting opportunities." App. 13. In support of

[3] The cardinal purpose of the Court's negative Commerce Clause jurisprudence is to prevent states from interfering with the natural functioning of the interstate market through prohibition or burdensome regulation. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976). Inasmuch as the theoretical model of the private enterprise economy is built in primary part on private ownership and control of the means of production, *Economic Systems*, 6 Encyclopedia Britannica 274 (1974), it may well be thought that lawful possession of an article of commerce is a fundamental assumption in the Commerce Clause inquiry.

this determination, the court of appeals employed a "cf." signal in citing *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977), a commercial livelihood case. But *Douglas* is inapplicable in that no determination was made that the instant case involves a commercial livelihood such as engaged in by commercial shrimpers or commercial fishermen who make their living at sea.[4]

In addition to affecting the flow of people in interstate commerce, the court of appeals determined that the nonresident cap burdens the flow of goods through the channels of interstate commerce. "By disadvantaging nonresident hunters who seek to engage in this commercial pursuit, Arizona burdens interstate commerce at its point of supply." App. 14. For this reason, according to the court, Arizona's scheme "is thus similar to regulations of the commercial harvesting of other natural resources such as gas, *West* v. *Kan. Natural Gas Co.*, 221 U.S. 229 (1911) and fish, *Foster Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928), that the Supreme Court has consistently held are subject to the dormant Commerce Clause." App. 14-15.

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[4] Plaintiffs did not argue in the district court or in the court of appeals that the Arizona regulation discriminates against interstate commerce in their business of guiding and outfitting or threatens their livelihood. Instead, in their third amended complaint, plaintiffs Montoya, Valerio and Taulman alleged that they desire to hunt bull elk and antlered deer in Arizona in order to acquire the products and commodities that may be obtained from the animals (and, presumably, although not alleged, profit from their sale). Par. 22, App. 69. But plaintiffs' personal motives in taking a "busman's holiday" by seeking to engage temporarily in a recreational activity in a sister state does not transform the hunt into a commercial activity. To admit that would be to permit an individual's professed purpose to determine his classification before the law and thereby permit him to become a law unto himself. *Cf. Employment Division* v. *Smith*, 494 U.S. 872, 879 (1990).

But neither case is applicable here. In *West*, the Court dealt with natural gas reduced to possession,[5] while *Foster-Fountain* dealt with harvested shrimp destined for interstate commerce.[6]

Both *West* and *Foster-Fountain* involved application of the negative Commerce Clause to strike down state statutes found to interfere with commercial activity.[7] And commercial activity was involved in those cases because the natural gas and shrimp had been lawfully reduced to possession. Arizona's ten percent cap discriminates against nonresidents, but it does not discriminate against interstate commerce because hunting is not commercial activity, a predicate for negative Commerce Clause applicability. *United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995).

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[5] "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation." *West*, 221 U.S. 229, 255 (1911).

[6] The Louisiana enactment "permits all parts of the shrimp to be shipped and sold outside the state." *Foster-Fountain*, 278 U.S. at 13. "As to such shrimp the protection of the commerce clause attaches at the time of taking." *Id.*

[7] *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), also involved commercial activity in that the camp was similar to a hotel providing guests goods and services. *Id.*, 573.

2. The Decision of the Court of Appeals Conflicts with a Decision of the Supreme Court of Alaska and with Decisions of Other Courts that Have Considered the Issue.

Other courts that have considered this critical Commerce Clause issue have adopted a view contrary to that of the court of appeals. Indeed, the decision below is the first decision of which we are aware to subject a state's resident preference in recreational hunting to strict scrutiny analysis under the negative Commerce Clause.

In *Shepherd* v. *State of Alaska*, 897 P.2d 33 (Alaska 1995), the Supreme Court of Alaska rejected a Commerce Clause challenge by Alaska big game guides to a state statute requiring a preference for residents for personal or family consumption in the taking of moose, deer, elk and caribou. Sustaining the statutory preference for personal or family consumption by residents, the court held that unharvested game is not an article of commerce and that this is particularly so where the game, after taking, is still not destined for interstate commerce. 897 P.2d at 42.

In *Terk* v. *Ruch*, 655 F. Supp. 205 (D. Colo. 1987), a Texas resident who had been unsuccessful in applying for a permit to hunt bighorn sheep in Colorado sought to enjoin implementation of Colorado regulations under which approximately ninety percent of hunting permits for bighorn sheep and Rocky Mountain goats were allocated to residents. Rejecting plaintiff's Commerce Clause claim, the district court stated that "*Hughes* [v. *Oklahoma*] is completely dependent on the fact that the minnows were articles of commerce. Sheep and Goat are not commerce. In fact, it is illegal to sell them." 655 F. Supp. at 205 (Citation omitted). And see *United States* v. *Romano*, 929 F. Supp. 502, 509 (D. Mass. 1996) (claim that Alaska law

discriminates against interstate commerce rejected because "[r]ecreational hunting is not commerce.").

The court of appeals sought to distinguish *Shepherd* and *Terk* on the ground that in those cases the state had prohibited the sale of all parts of the animal harvested, App. 10, n.6, whereas in Arizona nonedible parts of lawfully taken wildlife may be sold. But it is apparent from the express reliance that those decisions place on the "not an article of commerce until harvested" rationale of *Hughes* that the courts viewed the total prohibition on sale as additional support for their determination and not a condition of them. *Shepherd*, 897 P.2d at 42 ("That unharvested game is not an article of commerce is particularly clear where the game, after its taking, is still not destined for interstate commerce."); *Terk*, 655 F. Supp. at 215 ("Sheep and Goat are not commerce. In fact, it is illegal to sell them.").

Moreover, the notion that permitting sale of nonedible parts once a person lawfully reduces wildlife to possession "burdens" interstate commerce whereas a total prohibition on sale removes the basis for a Commerce Clause challenge makes no sense. In *Hughes* the Court noted that overruling *Geer* eliminates the anomaly "that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge." 441 U.S. at 335.

3. Extension of Strict Scrutiny Analysis Under the Negative Commerce Clause to Resident Preferences in Recreational Hunting Is Important Because Such Preferences Are Common Among the States.

The decision of the court of appeals to subject state regulation of hunting to strict scrutiny analysis under the negative Commerce Clause is important because of its broad potential impact. Twenty-seven states, including Arizona, limit the number of nonresident permits available for hunting certain species especially prized by hunters.[8] In each state, the essential problem is reflected in one court's observation that "There are too many people and too few elk."[9] And in each of the twenty-seven states, commercial hunting is prohibited while the sale of nonedible parts is permitted in all save Alaska.

In addition to affecting state limitations on nonresident access in limited permit hunts, the decision of the court of appeals also throws resident-nonresident license fee differentials into question. As this Court noted in *Baldwin* v. *Fish & Game Comm'n of Montana*, 436 U.S. at 373, n.2, most states charge nonresidents more than residents for hunting licenses. If discrimination against nonresidents in allocation of permits is subject to strict scrutiny analysis, a further extension to license fee differentials seems only a small step.

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[8] Citations to state statutes and regulations limiting nonresident participation in limited permit hunts are set forth at App. 80-89.

[9] *Montana Outfitters Action Group* v. *Fish & Game Comm'n*, 417 F. Supp. 1005, 1009 (D. Mont. 1976).

Finally, the impact of the ruling of the court of appeals on conservation of wildlife resources cannot be a positive one. It is not by happenstance that bull elk and antlered deer now flourish in Arizona. Indeed, the court below noted that "Arizona's game supply is limited and . . . its continued vitality is a product of the State's conservation efforts." App. 19. If preferences for residents in recreational hunting, which this Court has characterized as "rational, not invidious," *Baldwin*, 436 U.S. at 389, are subjected to strict scrutiny analysis, the *per se* rule of which places no value on the conservation efforts of a state and its citizens, it can only be guessed whether the vitality of the resource, which are products of those efforts, will continue.

CONCLUSION

For the reasons set forth, this Court should issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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November 18, 2002

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSERVATION FORCE, INC.,

Plaintiff,

and

LAWRENCE MONTOYA; FILBERTO VALERIO; CAROLE JEAN TAULMAN,

Plaintiffs-Appellants,

v.

DENNIS MANNING, in his official capacity; MICHAEL GOLIGHTLY, in official capacity; HERB GUENTHER, in official capacity; WILLIAM BERLAT, in official capacity; M. JEAN HASSELL, in official capacity; LINDA MELKER,

Defendants-Appellees.

No. 00-17082
D.C. No.
CV-98-00239-RCB

LAWRENCE MONTOYA; FILBERTO VALERIO; CAROLE JEAN TAULMAN,

Plaintiffs-Appellants,

v.

DENNIS MANNING, in his official capacity; MICHAEL GOLIGHTLY, in official capacity; HERB GUENTHER, in official capacity; WILLIAM BERLAT, in official capacity; M. JEAN HASSELL, in official capacity; LINDA MELKER; DUANE R. SHROUFE,

Defendants-Appellees.

No. 00-17394

D.C. No.
CV-98-00239-RCB

OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
December 6, 2001 – San Francisco, California

Filed August 20, 2002

Before: Betty B. Fletcher, Robert Boochever and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

James R. Scarantino, Albuquerque, New Mexico, and Sherman Fogel, Fogel and Lamber, Phoenix, Arizona, for the plaintiffs-appellants.

Jay R. Adkins, Assistant Attorney General, Phoenix, Arizona, for the defendants-appellees.

OPINION

RAYMOND C. FISHER, Circuit Judge:

This case requires us to determine whether Arizona's 10% cap on nonresident hunting of bull elk throughout the state and of antlered deer north of the Colorado River substantially affects commerce such that the dormant Commerce Clause applies to the regulation. We hold that it does. We further hold that the regulation discriminates against interstate commerce, but that Arizona has legitimate interests in conserving its population of game and maintaining recreational opportunities for its citizens. We remand for further proceedings to determine whether

Arizona has met its burden of showing that these interests could not be served adequately by reasonable nondiscriminatory alternatives.

I.

BACKGROUND

Arizona is home to what is considered by many hunters to be some of the best deer and elk hunting in the world, exemplified by the world record animals harvested from its lands. The part of Arizona north of the Colorado River, called the "north Kaibab" and "Arizona strip," is a particularly scenic area known for its trophy elk and deer populations and is accordingly a location favored by hunters.

The quality of the hunting in Arizona is in large part a result of the conservation efforts supported by Arizona citizens and administered by the Arizona Department of Game and Fish ("Department"). The native Merriam elk was extirpated from Arizona in 1898. The present elk population descends from the Wapiti variety introduced to Arizona in 1913. In the case of both deer and elk, the maintenance of the state's herds has been ensured over the years through strict regulation of the number of hunting permits, known as "tags," issued each year.

For many years, Arizona distributed the limited tags made available for antlered deer and bull elk hunting through a lottery without regard to the residency of the

applicant.[1] In the late 1980s, however, the Department began to receive "very vocal" complaints by Arizona hunters who "object[ed] to competing with [nonresidents] to a point where they [felt] the nonresidents [were] getting more than their fair share of the opportunity, particularly [of] premium hunts." In early 1990, the Department conducted a poll of resident big game hunters and found that nearly 75% favored restricting the number of hunting tags issued to nonresidents, many expressing the opinion that nonresidents should be excluded from hunting in Arizona entirely.

In response to the pressure from Arizona hunters, the Department in 1991 amended Rule 12-4-114 of the Arizona Administrative Code to place a 10% cap on the number of tags that could be awarded to nonresidents for the hunting of bull elk throughout the state and for antlered deer in the area north of the Colorado River.[2] The Concise Explanatory Statement ("Statement") accompanying the regulation explained that between 1984 and 1989, the number of nonresidents receiving hunting tags for antlered deer north of the Colorado River ranged between 9% and 19%. It also showed that average nonresident receipt of bull elk tags remained below 6%, but was higher than 10% for some hunts. It explained that "the continued management of Arizona's big game is dependant on the

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[1] Only antlered deer and bull elk, the favored targets of big game hunters because of their size, scarcity and "trophy" of antlers, are subject to the restrictions at issue in this case.

[2] According to the Department, Arizona hunters are thought of as its "consumer base"; "our customers." Department officials justify the nonresident cap as "an attempt to reward Arizona's citizens for their ongoing support."

continued support of Arizona residents" and, citing the results of the 1990 survey showing "overwhelming support for a cap on nonresident hunters," stated its objective as giving "Arizona residents . . . the opportunity to hunt Arizona's best."

The Statement explained that "10% was chosen to be consistent with other limits on buffalo and bighorn sheep already established" in Arizona. It also stated that "most states have some type of nonresident restriction in hunts for species that are sought after." According to Department officials, the 10% cap was imposed because it is "comparable with systems of limitations that are placed upon [Arizona residents] when they are a nonresident [sic] in another state." *Cf. Terk v. Ruch,* 655 F. Supp. 205, 207, 210-11 (D. Colo. 1987) (upholding 10% cap on nonresident recreational hunting permits for sheep and goat in Colorado and commenting that "[m]ore than twenty states either allocate their licenses unevenly, or completely prohibit nonresidents from hunting certain species").

In addition to the 10% cap, the Department adopted a bonus point system for the tag lottery. Ariz. Admin. Code R12-4-107 (1991). A bonus point is earned for each year in which the applicant purchased an Arizona hunting license and unsuccessfully applied for a tag, with one additional point awarded for the completion of an approved hunter education course. In the tag lottery, hunters indicate their desired hunts and each is assigned a random number by a computer, plus an additional number for each bonus point. The lowest numbers in the pool for each hunt obtain the available tags, with the exception that higher-number-holding residents may bypass lower-number-holding nonresidents once the 10% cap on nonresidents is reached for that hunt. In addition, the first 10% of tags for each

hunt are awarded to the applicants with the most bonus points, regardless of the random number drawn. Although there is no nonresident restriction in the award of bonus points, Arizona residents appear to receive the most points and dominate the award of tags in the 10% bonus point set-aside.

Each plaintiff is a professional hunter and guide residing in New Mexico who applies for hunting tags around the country in order to obtain the meat of the animals, their hide, their ivories, and especially their head and rack of antlers to profit from the sale and use of the nonedible parts. Plaintiffs have applied for Arizona tags to hunt bull elk as well as antlered deer north of the Colorado River for this commercial purpose, but have never received a tag. They intend to continue applying for tags for hunts restricted by the 10% cap. In the hunts between 1997 and 1999 in which the plaintiffs applied for tags, nonresidents constituted between 15% and 51% of the applicants and received between 6% and 10% of the tags.[3]

Arizona law prohibits the commercial exchange of the edible portions of a harvested animal, but allows the sale of the nonedible portions. There is an interstate and international market for the antlers and hides of deer and elk. Poor quality elk antlers, largely supplied by ranches raising elk for this purpose, are sent to Korea where they are processed into a nutritional supplement. Better quality

[3] We agree with the district court that these facts are sufficient to satisfy the elements of standing. *See N.E. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that "inability to compete on an equal footing" is a sufficient injury in fact for purposes of standing).

antlers of elk and deer, almost entirely supplied by hunters, are used for display and for creating art and furniture and can sell for hundreds to thousands of dollars, up to $50,000 for the very best.

Plaintiffs' suit originally claimed that the Arizona regulation violated the Commerce, Privileges and Immunities and Equal Protection Clauses of the U.S. Constitution and requested a declaration of invalidity as well as damages. The district court granted the Department's cross-motion for summary judgment on the Commerce Clause claim. Plaintiffs voluntarily dismissed the remaining counts of their complaint and filed this appeal. We review the grant of summary judgment de novo. *See Lite-On Peripherals, Inc. v. Burlington Air Express, Inc.*, 255 F.3d 1189, 1192 (9th Cir. 2001), *cert denied*, 122 S. Ct. 1067 (2002).

II.

DISCUSSION

The Supreme Court's "negative" or "dormant" Commerce Clause jurisprudence is forged from the tension between the Constitution's commitments that our nation be united, free of "conflict[ing] . . . commercial regulations, destructive to the harmony of the States," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring), and that it be composed of states, "that without certain residency requirements . . . would cease to be the separate political communit[ies] that history and the constitutional text make plain w[ere] contemplated." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 n.13 (1985) (internal quotation marks and citation omitted).

Under the Articles of Confederation, the balance decidedly favored the autonomy of states with the result that "[w]hen victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began" in which "each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 533 (1949) (internal quotation marks and citation omitted). The fear that this state of affairs would ultimately destroy the unity of the nation was an "immediate cause, that led to the forming of a [constitutional] convention." *Gibbons,* 22 U.S. at 224 (Johnson, J., concurring). In order "to keep the commercial intercourse among the States free from all invidious and partial restraints," *id.* at 231, the Convention included within the final constitution the Commerce Clause: "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 1, 3.

Although the Commerce Clause is phrased as an affirmative grant of regulatory power to Congress, the Supreme Court "has advanced the solidarity and prosperity of this Nation" by giving meaning to the Clause's "great silences." *H.P. Hood,* 336 U.S. at 535. Thus, the Court has interpreted Congress' authority to regulate commerce "to its utmost extent," *Gibbons,* 22 U.S. at 196, and has long interpreted the Clause to have a "negative aspect," referred to as the dormant Commerce Clause, "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 98 (1994); *see Cooley v. Bd. of Wardens,* 53 U.S. (12 How.) 299,

318 (1851), *overruled on other grounds by Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).[4] The Court, however, also has striven to interpret the Clause to avoid hampering any state's "ability to structure relations exclusively with its own citizens." *Reeves, Inc. v. Stake,* 447 U.S. 429, 441 (1980); *see also H.P. Hood,* 336 U.S. at 533-34 (explaining that "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of [states'] power over their internal affairs"). Thus, the Court has "struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation." *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 596 (1997) (Scalia, J., dissenting).

We turn first to whether the dormant Commerce Clause applies to Arizona's cap on nonresident hunting. Contrary to the finding of the district court, we hold that it does and therefore proceed to apply the Supreme Court's guidelines for determining whether Arizona's regulation unjustifiably discriminates against or burdens interstate commerce. *See, e.g., Town of Harrison,* 520 U.S. at 572-77 (considering first whether the dormant Commerce Clause applied and then whether challenged law impermissibly

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[4] This expansive reading of the Commerce Clause and its goals is derived in part from the writings of James Madison, one of the Clause's chief architects. 1 Laurence H. Tribe, American Constitutional Law § 6-3, at 1044-45 (3d ed. 2000) (explaining the "Madisonian" roots of the Court's interpretation of the Commerce Clause).

discriminated against interstate commerce); *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 389-90 (1994) (applying similar analysis).

A. *Applicability of the dormant Commerce Clause.*

The district court concluded that the Commerce Clause does not apply to Arizona's regulation of hunting tags because hunting is "recreation," which is not "a form of interstate commerce," and because parts of elk and deer do not become articles of commerce until they are "reduced to possession" by a hunter. The district court based these conclusions on the Supreme Court's holding in *Baldwin v. Fish & Game Comm'n,* 436 U.S. 371, 388 (1978), that recreational hunting is not one of the fundamental rights protected by the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1,[5] and its statement in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), that "when a wild animal 'becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State,'" *id.* at 339 (quoting *Geer v. Connecticut,* 161 U.S. 519, 538 (1896) (Field, J., dissenting)).[6]

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[5] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[6] Other courts have adopted similar reasoning in cases where, unlike in Arizona, the state prohibits the sale of all parts of the animal harvested. *See Terk,* 655 F. Supp. at 215 (refusing to apply dormant Commerce Clause to nonresident cap on sheep and goat hunting because "Sheep and Goat are not commerce. In fact, it is illegal to sell them."); *Shepherd v. Alaska,* 897 P.2d 33, 42 (Ak. 1995) (reasoning that "unharvested game is not an article of commerce . . . where the game, after its taking, is still not destined for interstate commerce"); *cf. U.S. v.*

(Continued on following page)

The question before the Supreme Court in *Fish & Game Comm'n* was whether the Privileges and Immunities Clause applied to a Montana law charging out-of-state residents a higher fee for recreational elk hunting licenses. The Court held that the Privileges and Immunities Clause does not apply to such a law because that clause addresses only distinctions in the exercise of those fundamental rights "bearing upon the vitality of the Nation as a single entity," such as burdens on the pursuit of common callings, the ownership and disposition of privately held property and access to the courts. 436 U.S. at 383. The Court concluded that Montana's regulation "simply does not fall within the purview of the Privileges and Immunities Clause" because "[e]lk hunting by nonresidents in Montana is a recreation and a sport . . . not a means to the nonresident's livelihood." *Id.* at 388. "Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause," the Court stated, "we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them." *Id.*

Fish & Game Comm'n does not foreclose application of the dormant Commerce Clause here. Although the Commerce and Privileges and Immunities Clauses have a "mutually reinforcing relationship" stemming "from their

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Romano, 929 F. Supp. 502, 509 (D. Mass. 1996) ("Recreational hunting is not commerce."). The Supreme Court has indicated, however, that even wild animals "killed for the purposes of food" may be articles of commerce for the purposes of dormant Commerce Clause analysis. *Hughes*, 441 U.S. at 329 (quoting *Geer*, 161 U.S. at 541 (Field, J., dissenting)); *cf. Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (holding that home consumption of wheat, by allowing users to forego purchases in the interstate market, substantially affects interstate commerce).

common origin in the Fourth Article of the Articles of the Confederation and their shared vision of federalism," *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (footnote omitted), the analytical framework for addressing challenges under each clause is not identical. To determine whether the dormant Commerce Clause is applicable, we ask not whether the activity regulated is a right fundamental to the vitality of the nation as a single entity, but whether it has a "substantial effect" on interstate commerce such that Congress could regulate the activity.[7] *Camps*, 520 U.S. at 574; *see also Hughes*, 441 U.S. at 326 n.2 ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.").

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[7] Contrary to the district court's finding, even if the regulated activity is not itself "a form of interstate commerce," it may still substantially effect interstate commerce and therefore be subject to the Commerce Clause. In the Supreme Court's early jurisprudence, the Court resolved dormant Commerce Clause cases by categorically distinguishing between invalid regulations of "interstate commerce" and valid exercises of "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government," *Gibbons*, 22 U.S. (9 Wheat.) at 203, often referred to as the state's "police power," *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding requirement that vessels arriving into New York report names of passengers on ground that it was "not a regulation of commerce, but of police"). That mode of categorical reasoning came under early criticism. *See Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259, 271 (1875) ("Nothing is gained in the argument by calling it the police power."). Modern dormant Commerce Clause analysis is applicable to all police power regulation, including the core areas of health and safety protection. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441-43 (1978); *see also Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-56 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

In *Camps,* the Supreme Court held that a Maine law that extended beneficial tax treatment to operators of nonprofit camps that served mostly Maine residents violated the dormant Commerce Clause. 520 U.S. at 595. In so holding, the Court rejected Maine's contention, similar to that pressed by Arizona and adopted by the district court here, that regulation of recreational camping is insulated from Commerce Clause scrutiny "because the campers are not 'articles of commerce,' or more generally that interstate commerce is not at issue." *Id.* at 574. The Court called these assertions "unpersuasive" because the services of the camps, by encouraging interstate travel, "clearly have a substantial effect on commerce, as do state restrictions on making those services available to nonresidents." *Id.* Similar reasoning controls here. Like recreational camping in Maine, hunting in Arizona promotes interstate travel of people, like the plaintiffs, who want to take advantage of Arizona's excellent hunting opportunities. *Cf. Douglas v. Seacoast Prods., Inc.,* 431 U.S. 265, 282 (1977) (reasoning that commercial fishing is subject to the Commerce Clause in part because "[t]he movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce").

In addition to substantially affecting the interstate flow of people, hunting in Arizona substantially affects the interstate flow of goods in commercial markets. Congress has noted, in another context, that regulation of hunting "endangered species of wildlife with some commercial value" affects interstate commerce, because with "controlled exploitation . . . business[es] may profit from the trading and marketing of that species . . . , where otherwise it would have been completely eliminated from

commercial channels." S. Rep. No. 91-526 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415.[8] The hunting that is regulated by Arizona's cap on nonresident tags is not restricted to that conducted for recreational or subsistence purposes, and in this way Arizona's scheme differs from Montana's regulations at issue in *Fish & Game Comm'n.*[9] Arizona allows the nonedible portions of bull elk and antlered deer taken from its lands to be sold in interstate and international markets and therefore Arizona's regulation of hunting has a substantial effect on the flow of goods through the channels of interstate commerce. By disadvantaging nonresident hunters who seek to engage in this commercial pursuit, Arizona burdens interstate commerce at its point of supply. It is thus similar to regulations of the commercial harvesting of other natural resources such as gas, *West v. Kan. Natural Gas Co.*, 221 U.S. 229 (1911), and fish, *Foster Fountain Packing Co. v. Haydel*, 278 U.S.

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[8] This report accompanied a reauthorization of the Lacey Act, making it "unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A). Even where the species hunted has no current commercial value, Congress may regulate under its Commerce Clause authority to "prevent[ ] the destruction of biodiversity and thereby protect[ ] the current and future interstate commerce that relies upon it." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (upholding the Endangered Species Act as a valid exercise of Congress' Commerce Clause authority).

[9] In *Fish & Game Comm'n*, the Court explained that "[e]lk are not hunted commercially in Montana," there being "statutory restrictions ... on the buying and selling of game animals, or parts thereof." 436 U.S. at 375 & n.11.

1 (1928), that the Supreme Court has consistently held are subject to the dormant Commerce Clause.

The statement in *Hughes* that "when a wild animal becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another" is not to the contrary. *Hughes,* 441 U.S. at 339 (quoting *Geer,* 161 U.S. at 538 (1896) (Field, J., dissenting)). That statement was made in the context of clarifying that the Court would thenceforth apply "to state regulations of wild animals . . . the same general rule applied to state regulations of other natural resources." *Hughes,* 441 U.S. at 335; it was not creating a temporal demarcation in an animal's commercial status.[10] Under the general rule applied to regulations of natural resources, differential burdens on out-of-state access to natural resources are subject to the dormant Commerce Clause whenever the burden substantially affects interstate commerce, even if the resource itself, such as the beauty of Maine's lakes, *Camps,* 520 U.S. at 574, is not an article of commerce per se. The Supreme Court has never construed *Hughes* to exempt from dormant Commerce Clause scrutiny state discrimination in the harvesting of resources destined for interstate commerce. To the contrary, "[f]or over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce . . . is invalid." *W. Lynn Creamery, Inc.*

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[10] *Hughes* overruled *Geer,* which upheld a ban on the killing of certain wild birds for the purposes of interstate export on the theory that the state owned the wild animals within its borders and thus had the "right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." 161 U.S. at 530.

v. Healy, 512 U.S. 186, 202 (1994). Thus, even though fishing, like hunting, is an activity that takes place before the animal becomes an article of commerce, the Supreme Court explained in *Douglas* that the "proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent." *Douglas,* 431 U.S. at 285-86.

We conclude that because hunting of bull elk and antlered deer in Arizona substantially affects interstate commerce, as do Arizona's restrictions on that hunting by nonresidents, the dormant Commerce Clause is applicable here.

B. *Validity of Arizona's nonresident cap.*

Our conclusion that Arizona's regulation of hunting substantially affects interstate commerce does not answer the question of whether the regulation violates the dormant Commerce Clause. The existence of unexercised federal regulatory power does not categorically foreclose state regulation. *Sporhase v. Nebraska,* 458 U.S. 941, 954 (1982). The Supreme Court's decisions yield two lines of analysis to determine whether Arizona's regulation is valid despite its substantial effect on interstate commerce: the first where the state discriminates against interstate commerce; the second where the state regulates even-handedly but nevertheless imposes some burden on interstate commerce. *C & A Carbone,* 511 U.S. at 389-90.

A state discriminates against interstate commerce by treating differently in-state and out-of-state economic interests, including consumers of natural resources, such that the regulation benefits the former and burdens the

latter. *Or. Waste Sys.*, 511 U.S. at 99. Where discrimination exists, the regulation is subject to strict scrutiny under which it is the state's burden to show that the discrimination is narrowly tailored to further a legitimate interest. *Sporhase*, 458 U.S. at 957-58. On the other hand, if the state regulates evenhandedly, the regulation is valid unless the plaintiff can show that it imposes a burden on interstate commerce "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The district court held that, even if the dormant Commerce Clause applied to Arizona's cap on nonresident hunting, the plaintiffs failed to show under *Pike* that the cap imposed a burden on interstate commerce clearly excessive in relation to its putative local benefits. We disagree with the district court's conclusion that *Pike* was the appropriate standard to apply because Arizona's cap on nonresident hunting licenses is not an even-handed regulation. It restricts access to Arizona's population of bull elk and antlered deer based on whether the hunter is a resident of Arizona. This overt discrimination in access to Arizona's resources is subject to the strictest scrutiny under the dormant Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *cf. Camps*, 520 U.S. at 578 ("By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent."). We must therefore analyze whether Arizona has met its burden, as a matter of law, of demonstrating that its cap on nonresident hunting is narrowly tailored to serve legitimate interests of the state.

1. *Legitimate interests.*

We turn first to whether Arizona has set forth legitimate interests for its regulation of hunting. Although the Supreme Court has adopted a broad construction of the applicability of the dormant Commerce Clause, it has cautioned that "[t]he Commerce Clause ... does not elevate free trade above all other values." *Maine v. Taylor,* 477 U.S. 131, 151 (1986). States have broad powers to regulate in the interests of their citizens.

Arizona's cap on nonresident hunting was designed to serve its interests in conserving the population of game on its lands while maintaining recreational hunting opportunities for its citizens. These interests are unquestionably legitimate. The protection of wildlife and other natural resources of a state are some "of the state's most important interests." *Pac. N.W. Venison Producers v. Smitch,* 20 F.3d 1008, 1013 (9th Cir. 1994); *see also Taylor,* 477 U.S. at 151 ("[Each state] retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."); *Kleppe v. New Mexico,* 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."). It has also long been recognized that a state has a legitimate interest in providing "enjoyment to its own people." *Toomer v. Witsell,* 334 U.S. 385, 409 (1948) (Frankfurter, J., concurring).

A state may have additional interests in granting "in times of severe shortage ... a limited preference for its own citizens in the utilization of [a] resource" that, through the state's conservation efforts, "has some indicia of a good publicly produced and owned." *Sporhase,* 458 U.S. at 956-57. Thus, in *Sporhase,* the Court held that

Nebraska's restrictions on exporting water from the state in times of shortage did not violate the Commerce Clause, *id.* at 956, noting that "[a] demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water." *Id.* at 958. It is undisputed that Arizona's game supply is limited and that its continued vitality is a product of the State's conservation efforts. But these factors alone do not justify a preference for Arizona citizens in access to Arizona's game.

Where the resource in question is "produced" by conservation, rather than being "the end product of a complex process [by the state] whereby a costly physical plant and human labor act on raw materials," *Reeves,* 447 U.S. at 444, scarcity of the resource does not itself justify discrimination against out-of-state residents. Thus, the Supreme Court struck down New Jersey's effort to "saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites," although it recognized that landfill space was a "scarce resource" the state was striving to conserve. *City of Philadelphia,* 437 U.S. at 628-29. Similarly, the Court has struck down efforts to preserve for the state's own citizens the use of hydroelectric power, *New England Power Co. v. New Hampshire,* 455 U.S. 331, 338 (1982), and natural gas, *Pennsylvania v. West Virginia,* 262 U.S. 553, 594 (1923); *Kan. Natural Gas Co.,* 221 U.S. at 255-56, although those resources undeniably are scarce and produced through conservation as well.

An important difference noted in *Sporhase* is that water is a "vital resource" the regulation of which directly serves "the purpose of protecting the health of its citizens,"

an interest that lies "at the core of its police power." *Id.* at 956; *see also Or. Waste Sys.*, 511 U.S. at 107 (describing *Sporhase* as "premised on several different factors tied to the simple fact of life that 'water, unlike other natural resources, is essential for human survival'") (quoting *Sporhase*, 458 U.S. at 952). Arizona has not asserted that its cap on nonresident hunting is designed to protect an important and traditional food source for its citizens, which might similarly lie at the core of its police power. *See Toomer*, 334 U.S. at 409 (Frankfurter, J., concurring) ("It is one thing to say that a food supply that may be reduced to control by a State for feeding its own people should be only locally consumed. . . . It is a wholly different thing for the State to provide that only its citizens shall be engaged in commerce among the States, even though based on a locally available food supply. That is not the exercise of the basic right of a State to feed . . . its own people."); *Foster Fountain Packing Co.*, 278 U.S. at 13 (stating that "by permitting its shrimp to be taken and . . . shipped and sold in interstate commerce, the state necessarily releases its hold"); *cf. Shepherd*, 897 P.2d at 35 (rejecting Commerce Clause challenge to Alaska law providing that "the taking of moose . . . by residents for personal and family consumption has preference over taking by nonresidents"). We therefore cannot conclude that scarcity of Arizona's game itself provides a legitimate justification for its discrimination against out-of-state hunting. We do, however, consider the fact that elk and deer in Arizona are scarce and are products of its conservation efforts as additional factors supporting the legitimacy of the state's interests in ensuring the conservation of that population and maintaining its availability for recreational hunting by Arizona's citizens.

We conclude that Arizona has met its burden under the first part of the strict scrutiny analysis. It has legitimate interests in preserving the health of its game populations and maintaining recreational hunting opportunities for its citizens. The key question in our analysis, then, is whether Arizona has met its burden under the second part of the inquiry by demonstrating that the cap is narrowly tailored to its legitimate ends.

2. *Narrow tailoring.*

The Supreme Court's narrow tailoring analysis under the dormant Commerce Clause focuses on the requirement that the state "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone,* 511 U.S. at 392; *see also Or. Waste Sys.,* 511 U.S. at 100-01 (explaining that under strict scrutiny the regulation "must be invalidated unless [the state] can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives") (internal quotation marks omitted); *Hughes,* 441 U.S. at 337-38 (explaining the state's burden to show, under "the strictest scrutiny," that the regulation is the "least discriminatory alternative" to advance a legitimate purpose). The district court did not address whether other means exist that could serve Arizona's interests because it concluded that the Commerce Clause did not apply to the nonresident cap and that, even if the Clause did apply, it was the plaintiffs' obligation to show that the cap excessively burdens interstate commerce under the *Pike* balancing test applicable to evenhanded regulation. Because we hold that strict scrutiny applies to Arizona's regulation, however, it follows

that Arizona bears the burden of showing that it has no other means to advance its legitimate interests.

As we noted above, the scarcity of Arizona game does not itself justify discrimination against out-of-state access to hunting. The Commerce Clause does not permit a state to "force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." *Hughes,* 441 U.S. at 337. Arizona concedes the self-evident proposition that whether a resident or nonresident harvests an animal has no biological impact on the population of game. Arizona argues, however, that its cap on nonresident hunting is necessary for the conservation of its game populations because without it Arizona citizens might withdraw support from the Department's programs. To support this proposition, the state points to poll data showing that Arizona hunters are broadly supportive of the 10% cap and that many demand a total ban on nonresident hunting.

Arizona cannot meet its burden of showing that its cap on nonresident hunters is narrowly tailored to its conservation interest simply by demonstrating that Arizona residents desire similar or more severe restrictions on nonresident access to hunting, even if Arizona could show that residents conditioned their support of the government's programs on the adoption of such discrimination. In *Fish & Game Comm'n,* the Supreme Court rejected a similar argument, stating that under the Privileges and Immunities Clause "the State's need or desire to engender political support for its conservation programs cannot by itself justify an otherwise invidious classification." 436 U.S. at 391 n.24. The same is true in dormant Commerce Clause analysis. The Commerce Clause, like

the Privileges and Immunities Clause, was included in the Constitution to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state's represented citizens. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 77-84 (1980).[11] The Supreme Court's application of strict scrutiny to discriminatory burdens on interstate commerce developed out of a similar recognition "that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *S.C. State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938); *accord South-Central Timber Dev., Inc., v. Wunnicke*, 467 U.S. 82, 92 (1984); *Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 768 n.2 (1945). Allowing the intensity of political will in a state to justify discrimination against

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[11] According to Professor Ely, the Privileges and Immunity Clause and the Commerce Clause ensure a system of "virtual representation" whereby states are prohibited from treating the nonrepresented less favorably than the represented:

> An ethical ideal of equality is certainly working here, but the reason inequalities against nonresidents and not others were singled out in the original document is obvious: nonresidents are a paradigmatically powerless class politically. And their protection proceeds by what amounts to a system of virtual representation: by constitutionally tying the fate of the outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.

Id. at 83.

nonresidents would radically undermine the representation-reinforcing policies underlying the dormant Commerce Clause doctrine. To show that its discriminatory barrier to interstate commerce through denial of access to its natural resources is narrowly tailored to its legitimate interests, Arizona must show more than in-state political demand for the discrimination imposed.

Nor can Arizona show that its 10% cap on nonresident hunting is narrowly tailored to serve legitimate interests because other states have similarly restricted nonresident hunting. Discrimination against interstate commerce "cannot, of course, be justified as a response to another State's unreasonable burden on commerce." *Sporhase,* 458 U.S. at 958 n.18. If we were to uphold Arizona's set-aside because other states act in similarly discriminatory ways, we would be condoning protectionist warfare that the Commerce Clause was meant to prohibit. Montana could then reserve 90% of its trout fishing, California 90% of its beach access, Colorado 90% of its back country skiing and so on until recreational opportunities and the businesses that served them were partitioned at state lines. *Cf. Kan. Natural Gas Co.,* 221 U.S. at 255 (explaining that the Commerce Clause was meant to prevent the situation where "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals," such that "embargo may be retaliated by embargo"); *Camps,* 520 U.S. at 576 (opining that if Maine preferred camping opportunities for its own residents "by a statutory prohibition against providing camp services to nonresidents, the statute would almost certainly be invalid").

We do not foreclose the possibility that the goal of ensuring a state's citizens' access to recreational opportunities may justify limited consideration of residency in the

allocation of hunting tags in some circumstances. Whether there is a need for such consideration for hunting in Arizona turns on questions of fact not appropriate for resolution by this court. It is hardly clear that Arizonans need preferences in order to enjoy hunting in their state. The Statement accompanying the promulgation of the regulations explained that, without the cap or bonus point system, "most big game hunts . . . experience nonresident pressure below 5%," and that Arizonans received over 80% of the hunting tags issued for nearly every hunt for bull elk statewide and for antlered deer north of the Colorado River. A factfinder reasonably could conclude from this evidence that Arizona's regulation was designed to respond to political pressure from the Department's constituency, not to any actual need of Arizonans for more hunting opportunities.

Even if Arizona can show that some effort is needed to ensure that its citizens have access to recreational hunting, a question of fact remains whether a cap on nonresident hunting is the "least discriminatory alternative" to serve Arizona's interests. *Hughes,* 441 U.S. at 337-38. In enacting a rigid cap on nonresident hunting, Arizona put in place a severe form of discrimination in the allocation of government benefits. Whether there are other less discriminatory means that could serve adequately Arizona's legitimate interests is a question of fact we leave to the district court in the first instance.[12]

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[12] The district court may, for example, wish to explore whether a nondiscriminatory version of Arizona's bonus point system could further its interests.

CONCLUSION

We hold that Arizona's cap on nonresident hunting substantially affects and discriminates against interstate commerce and therefore is subject to strict scrutiny under the dormant Commerce Clause. Arizona has legitimate interests in regulating hunting to conserve its population of game and maintain recreational opportunities for its citizens. We remand for further proceedings to determine whether Arizona has met its burden of showing that it has no other means to advance its legitimate interests.

REVERSED AND REMANDED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-17082
CT/AG#: CV-98-00239-RCB

CONSERVATION FORCE, INC

Plaintiff

and

LAWRENCE MONTOYA; FILBERTO VALERIO; CAROLE JEAN TAULMAN

Plaintiffs - Appellants

DENNIS MANNING, in his official capacity; MICHAEL GOLIGHTLY, in official capacity; HERB GUENTHER, in official capacity; WILLIAM BERLAT, in official capacity; M. JEAN HASSELL, in official capacity; LINDA MELKER

Defendants - Appellees

NO. 00-17394
CT/AG#: CV-98-00239-RCB

LAWRENCE MONTOYA; FILBERTO VALERIO; CAROLE JEAN TAULMAN

Plaintiffs - Appellants

v.

DENNIS MANNING, in his official capacity; MICHAEL GOLIGHTLY, in official capacity; HERB GUENTHER, in official capacity; WILLIAM BERLAT, in official capacity; M. JEAN HASSELL, in official capacity; LINDA MELKER; DUANE R. SHROUFE

Defendants - Appellees

(Filed Sep. 19, 2002)

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered – 8/20/02.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LAWRENCE MONTOYA; FILIBERTO VALERIO; and CAROLE JEAN TAULMAN, Plaintiffs, vs. DUANE R. SHROUFE; DENNIS MANNING; MICHAEL GOLIGHTLY; HERB GUENTHER; WILLIAM BERLAT; M. JEAN HASSELL; and LINDA MELKER in their individual and official capacities, Defendants.	No. CIV 98-0239 PHX RCB ORDER (Filed Sep. 15, 2000)

Plaintiffs have sued several members of the Arizona Game and Fish Commission, the Director of the Arizona Game and Fish Department, and an employee of the Arizona Game and Fish Department in their official and personal capacities challenging the enforcement and implementation of an Arizona regulation that places a cap on the percentage of permit-tags that may be issued to nonresidents in order to hunt both antlered deer north of the Colorado River (hereinafter referred to simply as "antlered deer") and bull elk (i.e., antlered elk). Plaintiffs assert that enforcement of this regulation violates the Commerce, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. They brought suit under 42 U.S.C. § 1983 seeking declaratory relief that the restrictions on nonresident access to permit-tags for antlered deer and bull elk are unconstitutional,

injunctive relief barring Defendants from enforcing the restrictions, and money damages. In March 2000, Plaintiffs' claims for money damages were voluntarily dismissed. (Doc. # 84).

Currently pending before the court are Defendants' motion for summary judgment on the basis that Plaintiffs lack standing, Plaintiffs' motion for partial summary judgment on their Commerce Clause claim, Defendants' cross-motion for partial summary judgment on Plaintiffs' Commerce Clause claim, and Plaintiffs' motion to strike an affidavit filed by Defendants in support of their response and cross-motion for summary judgment on the Commerce Clause claim. The court heard oral argument on these various motions on September 5, 2000, at which time it took them under advisement. Having carefully considered the arguments and evidence presented by the parties, the court will now rule on all of these motions.

I. BACKGROUND

The regulation challenged by Plaintiffs in this lawsuit is Rule 12-4-114(E) of the Arizona Administrative Code.[1] Pursuant to that regulation, the Arizona Game and Fish

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[1] In their Third Amended Complaint, Plaintiffs also asserted that a bonus point system administered by the Defendants further reduce the number of permit-tags available to non-residents. (Third Am. Compl. ¶ 30). Plaintiffs, however, never raised the issue of this bonus point system in either their motion for partial summary judgment on the Commerce Clause claim or in response to Defendants' cross-motion for partial summary judgment on that claim. Accordingly, the court presumes that they have abandoned any claim that the bonus point system violates the Commerce Clause, instead focusing exclusively on Rule 12-4-114(E).

Department ("Department") is to ensure that no more than ten percent (10%) of the total available permit-tags for hunting bull elk and antlered deer are issued to non-residents. Ariz. Admin. Code 12-4-114(E) (1998).

To properly understand how Rule 12-4-114(E) works, an understanding of Arizona's hunt permit-tag and random draw system is required. Bull elk and antlered deer in Arizona may not legally be hunted without a valid permit-tag issued by the Department. (Third Am. Compl. ¶ 23; Answer ¶ 23). When an individual applies for a hunt permit-tag, a computer automatically assigns his or her application a twelve-digit random number. The assignment of this random number is not affected by the individual's residency. (Aff. of Linda Melker ¶ 6, at 3; Pls.' Statement of Facts II (PSOF II) ¶ 29). A draw system is then used for hunts in which the number of permit-tags for the hunt area and species must be limited, which includes hunts for bull elk and antlered deer. This draw system is actually comprised of three separate draws for each animal species in each hunt area. The first draw is prescribed by Rule 12-4-114(C)(2)(a) of the Arizona Administrative Code and is referred to as the ten percent (10%) set-aside draw, meaning that a maximum of ten percent (10%) of the permits for each hunt are given to the applicants with the most bonus points.[2] The second draw is known as the first and second choices draw. In this draw,

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[2] Bonus points are earned by the purchase of a license and unsuccessful application in any given year. These bonus points vary based on the number of years an applicant has purchased a license and been unsuccessful in the draw of a given species. In addition, a single permanent bonus point can be earned by attending and completing an approved hunter education course. (Aff. of Linda Melker ¶ 6, at 2).

the computer determines which applicant identifying a given hunt as his or her first or second choice has the lowest random number, and the computer then assigns that applicant a permit-tag for that hunt. This process continues until all available permit-tags for a given hunt have been assigned, or until all applicants designating that hunt as their first or second choice have been assigned a permit-tag. Finally, if all applicants designating a given hunt as their first or second choice have been assigned a permit-tag and permit-tags still remain available, a third draw is held. The third draw works the same as the second, only now applicants identifying a given hunt as their third, fourth, or fifth choice are assigned permit-tags based on their random numbers. Because of the high demand for permit-tags, there has been no third draw for either bull elk or antlered deer for several years. (Aff. of Melker ¶ 6, at 3-4; Pls.' Statement of Facts II ("PSOF II") ¶¶ 29-30).

The Department effectuates Rule 12-4-114(E) at the stage in the draw system when an applicant's random number is drawn by the computer. Specifically, if a nonresident is assigned a permit-tag based on his or her random number, the computer analyzes whether ten percent (10%) of the available permit-tags for that hunt have already gone to nonresident applicants. If nonresidents have already been assigned ten percent (10%) of the available permit-tags, the nonresident applicant is not issued a permit-tag even though his or her random number was drawn. If nonresidents have not yet been assigned ten percent (10%) of the available permit-tags, the nonresident applicant is issued a permit-tag. (Aff. of Melker ¶ 7; PSOF II ¶ 31).

Plaintiffs are all individuals residing in Taos, New Mexico. (Third Am. Compl. ¶¶ 1-3). Each of the Plaintiffs has worked full-time in the hunting, guiding, and outfitting industry for over ten (10) years. (PSOF II ¶ 1). Plaintiff Carole Jean Taulman is co-owner of U.S. Outfitters, a guiding and outfitting business for hunters operating in twelve (12) western states. U.S. Outfitters assists customers in obtaining hunting permits, provides them professional advice, and outfits and guides them in the field. (*Id.* ¶ 2). Plaintiffs Lawrence Montoya and Filiberto Valerio, are each employed by U.S. Outfitters as hunting guides. (*Id.* ¶ 3). Taulman, Montoya, and Valerio have each unsuccessfully applied for hunt permit-tags in Arizona for both bull elk and antlered deer, and they all intend to continue to apply for such hunt permit-tags in the future. (*Id.* ¶¶ 18-20).

Defendants Dennis Manning, Michael Golightly, Herb Guenther, William Berlat, and M. Jean Hassell are members of the Arizona Game and Fish Commission ("Commission"). (Third Am. Compl. ¶¶ 5-9; Answer ¶¶ 5-9). Defendant Duane R. Shroufe is the Director of the Department, and Defendant Linda Melker is the Department's systems and programming manager and has direct and personal responsibility for the operation of the computer program that effects the ten percent (10%) cap on issuance of permit-tags to nonresidents. (Third Am. Compl. ¶¶ 4, 10; Answer ¶¶ 4, 10).

The Department administers the laws of the State of Arizona relating to wildlife, and control of the Department is vested in the Commission. Ariz. Rev. Stat. Ann. § 17-201 (West 1996). The Director of the Department is appointed by the Commission and acts as the chief administrative officer of the Department. *Id.* § 17-211(A). The general

powers and duties of the Commission are described in A.R.S. § 17-231.

II. LEGAL STANDARD

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

If the nonmoving party bears the burden of proof on an element essential to one of his claims or defenses, that party must make a showing sufficient to establish a genuine issue as to the existence of the element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). The moving party need offer no evidence tending to negate the existence of that element to gain summary judgment, but rather need only inform the district court of the basis for its motion and identify those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S. Ct. at 2553.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). A material fact is any factual dispute that might affect the outcome of the case under the

governing substantive law. *Id.* at 248, 106 S. Ct. at 2510. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. *Id.* A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. *See id.* at 250, 106 S. Ct. at 2511. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. *See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987).

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON STANDING

Defendants have moved for summary judgment on all of Plaintiffs' claims based on an argument that they lack standing to pursue them. Plaintiffs have opposed that motion.

This court's subject-matter jurisdiction is limited to actual, ongoing cases or controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 757 (1982). The case or controversy mandate includes an incident requirement that all plaintiffs have standing to challenge the actions forming the basis of the lawsuit. *Id.* at 471, 102 S. Ct. at 758. The question of standing, in essence, "is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). The standing inquiry involves both constitutional limitations on federal-court jurisdiction and

prudential limitations on when a court should exercise constitutionally permissible jurisdiction.[3] *Id.* In order to satisfy the constitutional limitations on standing, a plaintiff must establish three things: (1) that he or she suffered a concrete injury in fact; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that it is likely that the injury will be redressed be [sic] a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). The injury must be concrete and particularized and actual or imminent, not conjectural or hypothetical. *Id.* at 560, 112 S. Ct. at 2136; *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984). The party invoking federal jurisdiction bears the burden of establishing these three elements. *Defenders of Wildlife*, 504 U.S. at 561, 112 S. Ct. at 2136.

Defendants previously moved to dismiss Plaintiffs' First Amended Complaint based on an argument that they lacked standing. In ruling on that motion, the court determined that Taulman, Montoya, and Valerio had alleged sufficient facts to establish standing. Specifically, each had alleged that he or she had unsuccessfully applied for permit-tags in Arizona to hunt antlered deer and bull elk and that he or she intended to apply for these permit-tags in the future. The court found as follows:

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[3] Prudential limitations include the principle that a generalized grievance shared in substantially equal measure by all or a large class of citizens is insufficient by itself to establish standing; the principle that a plaintiff generally must assert his or her own legal rights or interests, not those of third parties; and the principle that a plaintiff's complaint must fall within the zone of interests protected by the law invoked. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984). None of these prudential concerns are implicated in this case.

> The decreased probability these plaintiffs had in attaining a permit-tag due to A.A.C. 12-4-114(E) is a cognizable injury in fact for standing purposes. *See Northeastern Fla. Contractors v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303 (1993). The decreased probability of attaining a permit-tag is a direct result of and thus fairly traceable to the enforcement of A.A.C. 12-4-114(E) and likely could be remedied by a favorable court ruling. Plaintiffs Montoya, Valerio, and Taulman all have standing to challenge the enforcement of A.A.C. 12-4-114(E).

(Order dated January 4, 1999, at 6).

In their current motion for summary judgment, Defendants base their argument that Plaintiffs lack standing on evidence that the Department has never applied Rule 12-4-114(E) of the Arizona Administrative, Code to any hunt permit application submitted by Plaintiffs. Specifically, through the affidavit of Linda Melker, Defendants have presented evidence that for none of the Plaintiffs' applications for hunting permits from 1996 to 1999 was Rule 12-4-114(E) applied to bar them from receiving a permit-tag for bull elk or antlered deer. Melker reviewed each of the Plaintiffs' applications and determined that on each and every occasion they were denied a permit-tag for bull elk and antlered deer it was because their random number was higher than the last one drawn, not because the ten percent (10%) cap on nonresident permit-tags had been reached. (Aff. of Melker ¶ 8) Defendants argue that this uncontroverted evidence shows that Plaintiffs have not suffered any injury in fact due to enforcement of Rule 12-4-114(E), as each time they have been denied a permit-tag it has been due to their random number not being drawn, and thus the absence of Rule

12-4-114(E) would not have resulted in any of the Plaintiffs having received any of the permits sought for hunting bull elk and antlered deer.

In response to Defendants' motion for summary judgment, Plaintiffs argue that the fact that they may never have in the past been denied a permit-tag due to application of Rule 12-4-114(E) is irrelevant. They argue that they intend to apply for bull elk and antlered deer permits in the future and that Rule 12-4-114(E) forces them to compete for these permits on an uneven playing field as compared to residents of Arizona. Citing *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297 (1993), they claim that their decreased probability in obtaining a permit in the future is sufficient injury in fact for standing purposes.

In their reply memorandum, Defendants argue that the legal proposition set forth in *Northeastern Florida Contractors* regarding the decreased probability of obtaining a benefit is limited to equal protection litigation and does not bear on Plaintiffs' Commerce Clause claim. They further argue that because the odds of being drawn for a permit-tag in the first place are so remote, Plaintiffs cannot establish that it is likely that they will be denied permit-tags in the future based on application of Rule 12-4-114(E).

In *Northeastern Florida Contractors*, a trade association of contractors sought declaratory and injunctive relief against application of a Jacksonville ordinance requiring that ten percent (10%) of the annual amount spent on city contracts be set aside for minority business enterprises, defined as a business whose ownership was at least fifty-one percent (51%) minority or female. The trade

association challenged the ordinance under the Equal Protection Clause. *Northeastern Florida Contractors*, 508 U.S. at 658-59, 113 S. Ct. at 2299. The U.S. Court of Appeals for the Eleventh Circuit determined that the association did not have standing to challenge the ordinance because it had not demonstrated that any of its members would have successfully bid for any of the contracts but for the challenged ordinance. *Id.* at 664, 113 S. Ct. at 2302. Based on the following proposition of law, the Supreme Court reversed and held that the association did have standing:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of that former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Id. at 666, 113 S. Ct. at 2303. The Court held that the association had set forth sufficient allegations to establish its standing because it had alleged that its members regularly bid on construction contracts in Jacksonville and that they would have bid on contracts set aside pursuant to the city's ordinance were they able to do so. *Id.* at 668-69, 113 S. Ct. at 2304-05.

Defendants argue that *Northeastern Florida Contractors* is limited to equal protection cases, and thus Plaintiffs cannot rely on it to establish standing to raise their Commerce Clause claim. This court cannot agree with Defendants' proposed limitation on the principle of standing enunciated in *Northeastern Florida Contractors*. The Supreme Court never stated in that case that its reasoning was limited to the realm of equal protection cases. Importantly, the Supreme Court has in fact subsequently cited the proposition of *Northeastern Florida Contractors* in support of a determination of standing in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), a case involving a constitutional challenge to the Line Item Veto Act, not an equal protection claim.

In *Clinton*, a farmers' cooperative challenged the constitutionality of the Line Item Veto Act. It asserted standing based on the following events. The cooperative was formed to assist potato farmers in marketing and stabilizing prices, in part through a strategy of acquiring potato processing facilities. *Id.* at 2097. In 1997, Congress amended the Internal Revenue Code to permit owners of certain food refiners and processors to defer the recognition of gain if they sold their stock to eligible farmers' cooperatives. *Id.* at 2096. Using the Line Item Veto Act, President Clinton vetoed this provision of the 1997 Taxpayer Relief Act. *Id.* The farmers' cooperative argued that the loss of this provision would make it harder for them to purchase food processing facilities due to the fact that sellers would not be able to take advantage of the tax break on capital gains. *Id.* at 2097. The Supreme Court held that the farmers' cooperative had standing. In reaching that determination, the Court rejected the government's argument that the cooperative had to show that it

actually would have obtained a processing facility on favorable terms but for President Clinton's veto of the tax relief provision. Citing *Northeastern Florida Contractors*, the Court held that a denial of a benefit in the bargaining process can itself satisfy the injury in fact requirement, regardless of the end result. *Clinton*, 118 S. Ct. at 2101 n.22; *see also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1156 (9th Cir. 2000) (citing *Northeastern Florida Contractors* in finding standing in First Amendment case).

Defendants have cited no case law and the court, through its own research, has found none holding that the proposition set forth in *Northeastern Florida Contractors* regarding decreased probability for obtaining a benefit is inapplicable in Commerce Clause cases. In fact, during its research the court found a Seventh Circuit decision holding that a plaintiff had standing to raise a Commerce Clause claim based on the proposition set forth in *Northeastern Florida Contractors*. In *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), the State of Illinois passed the Coal Act, requiring utilities in the state to formulate Clean Air Act compliance plans that had to be approved by the Illinois Commerce Commission. Under the Coal Act, the utilities and the Illinois Commerce Commission were required to take into account "the need to use coal mined in Illinois in an environmentally responsible manner in the production of electricity and the need to maintain and preserve as a valuable State resource the mining of coal in Illinois" in preparing and approving these compliance plans. *Id.* at 593-94. Illinois passed this act in response to Congress' 1990 amendments to the Clean Air Act, which forced electric generating plants to take into account the sulfur content of coal it used. These amendments hurt the Illinois coal mining industry

because coal from Illinois is high in sulfur content as compared to coal from western states. *Id.* at 593. A trade association whose members included Colorado and Oregon coal companies brought suit under the Commerce Clause, seeking a declaration that Illinois' Coal Act was unconstitutional and an injunction against application of that act by the members of the Illinois Commerce Commission. *See id.* at 593, 594. The defendant members of the Illinois Commerce Commission sought dismissal of the complaint on the ground that the trade association lacked standing, having suffered no injury in fact. *Id.* at 594. The defendants argued that the trade association had not identified any business overtures by its members that were made and rebuffed on the basis of the Coal Act. The Seventh Circuit, though, rejected this argument, stating as follows:

> [T]he showing of specific "lost opportunities" is neither required to establish standing nor reasonably expected under the circumstances of this case. An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'." The Illinois Coal Act allegedly impinges on Alliance's members' rights to compete on an equal footing in interstate commerce. This injury is particular to suppliers and others who deal or are attempting to sell western coal to Illinois utilities. Despite the absence of evidence of specific lost deals, this competitive injury is neither "conjectural" nor "hypothetical" – the injury is not a particular lost sale but the "inability to compete on an equal footing." *Northeastern Florida Contractors v. Jacksonville*, ___ U.S. ___, ___, 113 S. Ct. 2297, 2303.

Id. at 594 (citations omitted).

This court agrees with the reasoning of the Seventh Circuit in *Alliance for Clean Coal*. "The chief purpose underlying [the Commerce] Clause is to limit 'the power of the States to erect barriers against interstate trade.'" *Individuals for Responsible Government, Inc. v. Washoe, County*, 110 F.3d 699, 703 (9th Cir. 1997) (quoting *Dennis v. Higgins*, 498 U.S. 439, 446, 111 S. Ct. 865, 870 (1991)). Like the equal protection claim in *Northeastern Florida Contractors*, the Commerce Clause proscribes barriers that make it more difficult for members of one group to obtain a benefit than it is for members of another group. The only difference is that in a Commerce Clause case the barrier is against nonresidents of a state, as opposed to a racial group, for instance, and the benefit involved is interstate commerce.

Defendants further argue that because Plaintiffs' probability of being drawn for a permit-tag in the first place is low given the demand for hunting bull elk and antlered deer, the likelihood that Plaintiffs will actually face a decreased probability for obtaining a permit-tag due to the application of Rule 12-4-114(E) is too remote to establish standing. In making this argument, Defendants presumably rely on the legal proposition set forth by the Supreme Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660 (1983), that individuals lack standing to seek injunctive relief against purported constitutional violations when the threat of a future violation against that individual is speculative or incredible as opposed to real and immediate.

In *Lyons*, the plaintiff sought an injunction against the use of choke holds by the Los Angeles Police Department. *Id.* at 98, 103 S. Ct. at 1663. The plaintiff had previously been placed in a choke hold after being stopped

for a traffic violation. *Id.* at 97-98, 103 S. Ct. at 1663. The Supreme Court determined that the plaintiff lacked standing to seek such injunctive relief because he faced no realistic future threat of being placed in a choke hold. The court felt that any such threat was conjectural because it would require too many contingencies. Specifically, the plaintiff would have to be stopped by police again and would either have to resist arrest or the officers stopping him would have to disobey police department policy regarding the use of choke holds. *See id.* at 102, 105-06, 103 S. Ct. at 1665, 1667.

The court does not find the circumstances of this case to present the same type of hypothetical injury as that faced in *Lyons*. Only one contingency need happen for Plaintiffs to be subject to the ten percent (10%) cap on nonresident hunting permit-tags: their random number needs to be drawn in the first place. While the odds of this happening are low given the demand for the specific hunting permits sought, the court does not find the threat of this occurrence to be "hypothetical." Furthermore, Plaintiffs have no control over avoiding this threat if they wish to seek permit-tags in the future. In contrast, the plaintiff in *Lyons* could avoid future choke holds by obeying the law. *See Nelsen v. King County*, 895 F.2d 1248, 1252 (9th Cir. 1990) (discussing *Lyons* and general rule that a litigant lacks standing when he relies upon a chain of contingencies that includes the violation of a law).

In conclusion, then, the court finds that Plaintiffs' decreased probability, as compared to Arizona residents, for obtaining an Arizona permit-tag to hunt bull elk or antlered deer is sufficient to satisfy the injury in fact requirement of standing. Having reached this determination, it appears plain to the court that Plaintiffs satisfy the

second and third constitutional requirements for standing. Plaintiffs' decreased probability for obtaining the permit-tags is a direct result of Defendants' administration and enforcement of Rule 12-4-114(E), and a ruling by this court enjoining Defendants from administering and enforcing Rule 12-4-114(E) would place nonresidents on equal footing with residents in obtaining a permit-tag.

IV. CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COMMERCE CLAUSE CLAIM

In Count I of their Third Amended Complaint, Plaintiffs assert a cause of action under the Commerce Clause. They allege that Defendants have violated the Commerce Clause by enforcing Rule 12-4-114(E) and thereby limiting nonresidents to no more than ten percent (10%), of Arizona's available permit-tags for hunting antlered deer and bull elk. Both Plaintiffs and Defendants have moved for partial summary judgment on this claim.

The Commerce Clause of the United States Constitution provides as follows:

> The Congress shall have [p]ower . . . [t]o regulate [c]ommerce with foreign [n]ations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3. Though the Commerce Clause speaks explicitly only of an affirmative grant of power to Congress to regulate interstate commerce, it has long been read by the Supreme Court to limit the regulatory powers of the states so far as they affect interstate commerce, even in the absence of any conflicting federal statute. *See Oregon Waste Sys., Inc. v. Department of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349

(1994); *State of Wyoming v. State of Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992); *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1179 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105, 119 S. Ct. 872 (1999). This "negative" aspect of the Commerce Clause is known as the "dormant" Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S. Ct. 1331, 1335 (1995). The dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden" interstate commerce. *See Oregon Waste Sys.*, 511 U.S. at 98, 114 S. Ct. at 1349; *see also State of Wyoming*, 502 U.S. at 454, 112 S. Ct. at 800.

The Supreme Court has established a two-part inquiry for determining whether a state has overstepped the bounds of the dormant Commerce Clause. First, the court must determine whether the state law operates, evenhandedly with only "incidental" effects on interstate commerce or whether it affirmatively discriminates against interstate commerce. If the law has only incidental effects on interstate commerce, it is constitutional unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits it serves. On the other hand, if the law affirmatively discriminates against interstate commerce, the state must demonstrate both that it serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. The Supreme Court has noted that if a law affirmatively discriminates against interstate commerce, it is virtually per se invalid. *See Oregon Waste Sys.*, 511 U.S. at 99, 114 S. Ct. at 1350; *Maine v. Taylor*, 477 U.S. 131, 138, 106 S. Ct. 2440, 2447 (1986).

The parties' primary dispute is whether the cap placed on nonresident access to permit-tags for bull elk

and antlered deer by Rule 12-4-114(E) constitutes discrimination against or a burden on interstate commerce. In other words, is the hunting of bull elk and antlered deer a form of interstate commerce, or are bull elk and antlered deer articles of commerce? According to Plaintiffs, these wild animals constitute a natural resource like underground water, *see Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456 (1982), or natural gas, *see West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S. Ct. 564 (1911), and Arizona thus cannot discriminate against nonresidents in gaining access to these animals. Defendants, on the other hand, argue that Rule 12-4-114(E) only regulates the pre-hunt licensing of recreational hunters for the harvesting[4] of wild game and that this activity does not involve an article of commerce or any commodity or service that is likely to become one. They argue that, before killed, wild animals such as bull elk and antlered deer are distinguishable from other natural resources cited by Plaintiffs.

Both sides rely heavily on two Supreme Court cases, Plaintiffs citing *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727 (1979), in support of their argument that a state cannot block access by nonresidents to wild animals, and Defendants citing *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 98 S. Ct. 1852 (1978), in support of

[4] The term "harvesting" is used by the parties in their briefings in referring to the killing of big-game animals. Though the term might have some commercial connotations, the court uses the term solely because it is one used by the parties in their briefings, and the court places no weight on the term itself. Rather, the court will focus solely on the facts of this case and the relevant case law in determining whether interstate commerce is in fact involved.

their argument that recreational hunting does not constitute interstate commerce. Before discussing these cases, the court notes from the outset that neither is directly on point with the circumstances and issues presented here.

In *Hughes*, the Supreme Court confronted the question of whether an Oklahoma statute prohibiting the transportation or shipment for sale outside the state of natural minnows (as opposed to those raised in a licensed hatchery) procured from the waters of the state violated the dormant Commerce Clause. 441 U.S. at 323, 99 S. Ct. at 1730. Relying on a Supreme Court decision from the late nineteenth century, *Geer v. State of Connecticut*, 161 U.S. 519, 16 S. Ct. 600 (1896), the state courts of Oklahoma upheld the statute against the Commerce Clause challenge. *Hughes*, 441 U.S. at 324-25, 99 S. Ct. at 1730-31. Resting on the conclusion that no interstate commerce was involved, the Supreme Court in *Geer* had upheld against a Commerce Clause challenge a Connecticut statute forbidding the transportation beyond state lines of game birds that had been lawfully killed within the state. The Court based its conclusion that interstate commerce was not involved in large part on the view that a state, as the representative of its citizens, owns all wild animals within the state, and thus can control not only the taking of game but also the ownership of game after it has been lawfully reduced to possession. *See also Hughes*, 441 U.S. at 327, 99 S. Ct. at 1731-32 (discussing *Geer*).

The Supreme Court in *Hughes* overruled *Geer* and held that Oklahoma's statute violated the Commerce Clause. It noted that the premise regarding state ownership of wild animals underlying the holding in *Geer* had been eroded by several subsequent decisions. *See, e.g., Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49

S. Ct. 1 (1928) (finding unconstitutional a Louisiana law that prohibited shrimp caught in the waters of that state from being exported outside the state until the heads and hull were cut off); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948) (invalidating a South Carolina statute that imposed a $25.00 licensing fee for each shrimp boat owned by a resident of the state as opposed to a $2,500.00 licensing fee for each one owned by a nonresident). The Court in *Hughes* then took the final step:

> We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule *Geer*.

441 U.S. at 335, 99 S. Ct. at 1736. Having reached that conclusion, the Court determined that Oklahoma's statute discriminated against interstate commerce on its face because it "forbid[ ] the transportation of natural minnows out of the State for purposes of sale, and thus 'overtly block[ed] the flow of interstate commerce at [the] State's borders.'" *Id.* at 336-37, 99 S. Ct. at 1736-37. Finally, the court determined that because Oklahoma had not chosen the least discriminatory alternative for serving its stated purpose of conservation, the statute violated the dormant Commerce Clause. *See id.* at 337-38, 99 S. Ct. at 1737.

Plaintiffs focus most of their attention on the statement of the Supreme Court in *Hughes* that challenges under the Commerce Clause to state regulation of wild animals should be subject to the same general rule of review as any other natural resource. Plaintiffs argue that, based on this holding, Rule 12-4-114(E) of the Arizona Administrative Code must be subjected to the same

Commerce Clause scrutiny as regulations of other natural resources. Defendants, though, contend that *Hughes* is completely dependent on the fact that the minnows involved there were articles of commerce. They argue that the Court in *Hughes* made a distinction between unpossessed wildlife and wildlife reduced to possession by killing or harvesting. Specifically, the Court stated as follows:

> [W]hen a wild animal "becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State."

Hughes, 441 U.S. at 339, 99 S. Ct. at 1738 (quoting *Geer*, 161 U.S. at 538, 16 S. Ct. at 608 (Field, J., dissenting)). Defendants argue that the Rule 12-4-114(E) thus does not regulate commerce because it regulates an activity that takes place before commerce because wildlife becomes an article of commerce. Defendants further argue that this case is distinguishable from *Hughes* because here there is no restriction on the export of the game after it is killed, i.e., after it becomes an item of commerce.

In *Baldwin*, the plaintiffs challenged under the Privileges and Immunities and Equal Protection Clauses of the United States Constitution a Montana law imposing licensing fees to hunt elk seven and one-half to twenty-five times greater for nonresidents versus residents. 436 U.S. at 372-74, 98 S. Ct. at 1854-55. The Court concluded that the law did not violate the Privileges and Immunities Clause. In reaching this conclusion, it first held that only those privileges and immunities "bearing upon the vitality of the Nation as a single entity" are protected under that constitutional provision. *Id.* at 383, 98 S. Ct. at 1860. Having reached this holding, the issue for the court was

whether recreational big-game hunting constituted such a privilege and immunity. Before reaching that analysis, the Court noted that though many early cases embraced the concept that states had complete ownership over wildlife within their boundaries, *see id.* at 384-65, 98 S. Ct. at 1860-61 (citing, for example, *Geer*), more recently the Supreme Court had recognized that the states' interest in regulating and controlling wildlife was not absolute and that states could "not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce." *See id.* at 385-86, 98 S. Ct. at 1861. Furthermore, a "State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Id.* at 386, 86 S. Ct. at 1861. Despite the erosion of the prior case law embracing the theory of state ownership of wildlife, the Court felt that the ownership theory still held vitality to the extent it stood for the importance of state control and regulation over wildlife in the absence of any federal regulation or federally protected interest. *See id.* at 386, 98 S. Ct. at 1861-62. The court concluded that the plaintiffs' interest in sharing Montana's limited resource of wildlife on more equal terms with Montana residents simply did not fall within the purview of the Privileges and Immunities Clause. *Id.* at 388, 98 S. Ct. at 1862-63. In reaching this conclusion, the court noted that elk hunting in Montana was a recreation and was not "a means to the nonresident's livelihood." *Id.* at 388, 98 S. Ct. at 1862. Using rational basis review, the Supreme Court also found Montana's licensing law to comply with the constitutional

requirements of equal protection. *See id.* at 388-90, 98 S. Ct. at 1863-64.

Defendants argue that *Baldwin* stands for the proposition that a state can discriminate against nonresidents in the regulation of recreational hunting because there is no federally protected right to hunt and take wildlife. They further argue that while *Baldwin* was, a Privileges and Immunities Clause case, its analysis of recreational hunting is equally applicable in a Commerce Clause case because the two clauses share a "mutually reinforcing relationship . . . that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S. Ct. 2482, 2490 (1978); *see Baldwin*, 436 U.S. at 379, 98 S. Ct. at 1858. Plaintiffs, on the other hand, claim that *Baldwin* is inapposite to this case because it involved hunters who had no occupational or commercial interest in harvesting the elk, as opposed to Plaintiffs here. They argue that the Court in *Baldwin* was careful to distinguish the facts it was presented from those cases where restrictions on nonresident access to wildlife had been struck down, because the nonresidents were pursuing economic interests. *See, e.g., Mullaney v. Anderson*, 342 U.S. 415, 72 S. Ct. 428 (1952) (disparate commercial licensing fees for resident versus nonresident fishermen); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948) (same). Plaintiffs further maintain that *Baldwin* is distinguishable on the basis that it was a Privileges and Immunities Clause case. They argue that while an analysis under that clause asks whether the activity in question is "basic to the maintenance or well-being of the Union," *Baldwin*, 436 U.S. at 388, 98 S. Ct. at 1863, all activity

affecting interstate commerce is protected under the Commerce Clause.

Having reviewed *Baldwin* and *Hughes*, the court believes that they are most properly read together as distinguishing between harvested game and recreational hunting of unharvested game. While harvested game can be an article of commerce and thus be subject to the strictures of the Commerce Clause, the recreational hunting of unharvested game is not commerce subject to that constitutional provision. The court reaches this conclusion based first on the distinct factual circumstances presented in *Baldwin* as opposed to *Hughes*, and second on statements made by the Supreme Court in *Hughes*.

In *Baldwin*, the Court faced a situation in which the State of Montana regulated the harvesting of game, not the free trade of any part of the game after it was harvested. Because the harvesting of game was recreational, commerce was not being regulated. In contrast, the Court in *Hughes* dealt with precisely the situation not faced in *Baldwin*. Namely, the State of Oklahoma restricted the free trade of harvested minnows such that they could not be sold outside the state. Thus, while the Court in *Baldwin* found state regulation of the harvesting of game constitutional, in *Hughes* it found state restrictions on the trade of harvested game unconstitutional.

While the Court in *Hughes* held that Oklahoma's restriction on the shipment of minnows outside the state for sale violated the dormant Commerce Clause, it made a statement at the conclusion of its opinion that supports the distinction drawn by this court:

> The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal

> life within their borders. Today's decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that "our economic unit is the Nation," and that when a wild animal "becomes an article of commerce . . . its use cannot be "limited to citizens of one State to the exclusion of citizens of another State."

Hughes, 441 U.S. at 338-39, 99 S. Ct. at 1737-38 (citations omitted). Accordingly, the Court's holding in *Hughes* was based on the fact that the minnows in that case had become and were an article of commerce at the point in time that Oklahoma was trying to regulate them. The State of Oklahoma, unlike the State of Montana in *Baldwin*, was not trying to regulate the harvesting of the minnows by which they became an article of commerce, but rather their transportation outside the state after they had been harvested and had become an article of commerce. *See also Baldwin*, 436 U.S. at 393, 98 S. Ct. at 1865 (Burger, C.J., concurring) ("Once wildlife becomes involved in interstate commerce, a State may not restrict the use of or access to that wildlife in a way that burdens interstate commerce.").

In an attempt to distinguish this case from *Baldwin*, Plaintiffs argue that they engage in hunting not for its recreational aspect, but rather only for its commercial aspect, i.e., the value of harvesting bull elk and antlered deer.[5] The court believes that Plaintiffs, in making this

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[5] Although Plaintiffs are all employees of U.S. Outfitters, a guiding and outfitting business for hunters, they have not argued that Arizona's Rule 12-4-114(E) affirmatively discriminates against interstate commerce in the form of guiding and outfitting business. U.S.

(Continued on following page)

argument, confuse the line to be drawn between *Baldwin* and *Hughes*. Arizona does not allow commercial hunting of bull elk and antlered deer. The state limits the number of these animals that can be harvested each year and restricts the methods by which hunters can harvest them. *See* Ariz. Admin. Code 12-4-114, 12-4-303, 12-4-304(A)(5), (6) (1998); *Cf. Mullaney v. Anderson*, 342 U.S. 415, 72 S. Ct. 428 (1952) (commercial fishing license); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948) (same). Any commercial aspect does not arise until after the antlered deer or bull elk is harvested, as at that point the antlers, or rack, and the hide can be transferred or sold. *See* Ariz. Rev. Stat. Ann. § 17-371(D) (West 1996). Unlike the Oklahoma statute involved in *Hughes*, Arizona places no restriction on the sale or transfer of these commercial items outside the state once the bull elk or antlered deer is lawfully harvested. Like the law confronted in *Baldwin*, Arizona's Rule 12-4-114(E) only restricts nonresident access to the harvesting of the game itself, not the market for the products of the harvested game.

Plaintiffs also cite several cases in which the Supreme Court found invalid under the dormant Commerce Clause various restrictions on the transportation of the natural

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Outfitters, originally a plaintiff in this action, raised such an argument earlier in this litigation, but the court dismissed the claims of U.S. Outfitters on January 6, 1999, for lack of standing, finding that U.S. Outfitters had pled no injury fairly traceable to the enforcement of Rule 12-4-114(E). Nowhere in their briefings to the court regarding the cross-motions for summary judgment on the Commerce Clause have the remaining plaintiffs asserted an argument regarding discrimination against outfitting and guiding business, and thus the court will not consider it in ruling on the cross-motions for summary judgment.

resources out of state. These cases, however, all dealt with restrictions on interstate transportation of captured or possessed natural resources in which a market existed, not restrictions on the capture of the natural resources. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456 (1982) (restriction on transportation of groundwater for use outside of the state); *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 43 S. Ct. 658 (1923) (law requiring companies handling natural gas obtained from the State of West Virginia to prefer West Virginia residents over nonresidents in selling that gas); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S. Ct. 564 (1911) (Oklahoma statute with the effect of preventing out-of-state consumers from purchasing Oklahoma's natural gas). Accordingly, the court finds those cases more in line with the facts presented in *Hughes*, not those presented in this case.

Plaintiffs also cite *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590 (1997), arguing that in that case the Supreme Court held that a Maine law restricting access by non-residents to the natural resource of Maine's "natural beauty" violated the Commerce Clause. The court, however, finds *Camps Newfound/Owatonna* inapposite to the circumstances of this case. In that case, the camp affected by the Maine statute was providing special services linked together with the opportunity to experience the natural beauty of Maine's outdoors. *See id.* at 573, 117 S. Ct. at 1596. The Court held that in that way the camp was similar to a hotel and thus commerce was involved. *See id.* at 573-74, 117 S. Ct. at 1597. The Court also likened Maine's discrimination against nonresident access to such camps to a state law burdening out-of-state access to domestically

generated hydroelectric power. *Id.* at 576-77, 117 S. Ct. at 1598. Accordingly, the Supreme Court likened the services provided by the camp to a product derived from a natural resource, and based on the case law discussed by this court in the previous paragraph (i.e., *Sporhase, Commonwealth of Pennsylvania*, and *West*), held that discriminating against access to such a product violated the Commerce Clause. *See id.* at 575-77 & 576 n.9, 117 S. Ct. at 1598 & n.9. Like *Sporhase, Commonwealth of Pennsylvania*, and *West*, the court finds the circumstances of *Camps/Newfound Owatonna* more in line with the facts presented in *Hughes* than with those presented in this case. The court finds nothing in *Camps/Newfound Owatonna* suggesting that the hunting of wildlife constitutes interstate commerce.

Other lower federal courts presented with the issue facing this court have reached a like conclusion as this court.[6] In *Terk v. Ruch*, 655 F. Supp. 205 (D. Colo. 1987), the United States District Court for the District of Colorado was presented with a constitutional challenge to a Colorado regulation allocating approximately ninety percent (90%) of the available sheep and goat hunting permits to residents. The plaintiff asserted that the regulation violated the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution. *Id.* at 206. At the outset, the court noted that more than twenty (20) other states either allocated hunting licenses unevenly between residents and nonresidents,

[6] Neither side cited any U.S. Court of Appeals decision regarding the issue presented here, and the court through its own research found no such decision.

or completely prohibited nonresidents from hunting certain species. *Id.* at 207. The court first ruled against the plaintiff on the Privileges and Immunities Clause claim based on the ruling in *Baldwin* that recreational hunting is not an activity protected under that clause. *Id.* at 209-10. Using rational basis review, the court next held that the allocation system was valid under the Equal Protection Clause because it was rationally related to the legitimate state interest of gaining residential support for the Colorado Wildlife Commission. *See id.* at 214. Finally, the court rejected the plaintiff's Commerce Clause arguments, which relied in large part on the Supreme Court's holding in *Hughes*. The court found Hughes distinguishable because it depended on the fact that minnows were an article of commerce and the fact that Oklahoma's statute interfered with the commercial livelihood of nonresidents. In contrast, the court held that sheep and goats were not commerce, as it was in fact illegal under Colorado law to sell them, and that no commercial livelihood was involved, as the hunting of sheep and goats was recreational. *See id.* at 215; *see also United States v. Romano*, 929 F. Supp. 502 (D. Mass. 1996) ("Recreational hunting is not commerce."); *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 860-61 (D. Wyo. 1994) (upholding against dormant Commerce Clause challenge a hunting allocation system that preferred residents over nonresidents) (on appeal, the Tenth Circuit determined that the plaintiffs did not have standing to raise the Commerce Clause claim and that accordingly the district court had been without subject-matter jurisdiction to rule on the matter); *DeMasters v. State of Montana*, 656 F. Supp. 21 (D. Mont. 1986) (holding that hunting license allocation system with preference for residents did not violate either Privileges and Immunities Clause or Equal Protection Clause); *Tangier Sound Watermen's Ass'n v.*

Douglas, 541 F. Supp. 1287, 1306 (E.D. Va. 1982) (holding that Commerce Clause was not violated because harvesting of crabs was not interstate commerce and because there was no restriction on commercial trade in crabs after they were harvested).

Having determined that the actual act of hunting in Arizona does not constitute interstate commerce, the court fails to see how Rule 12-4-114(E) of the Arizona Administrative Code discriminates against interstate commerce. That regulation only limits access to the act of hunting bull elk and antlered deer. Unlike the law involved in *Hughes*, Rule 12-4-114(E) does not restrict access to any products derived from the bull elk or antlered deer after they are harvested. Those products derived from the bull elk and antlered deer that can be sold and transferred, i.e., the antlers and hide, can be freely sold or transferred to residents and nonresidents alike. *See* Ariz. Rev. Stat. Ann. § 17-371(D).

Plaintiffs assert that Rule 12-4-114(E) burdens interstate commerce in the products derived from harvested bull elk and antlered deer because it places Arizona residents in a position of monopolistic control over these products by setting aside for residents ninety percent (90%) of the permits for hunting these animals. The court does not agree with this assertion. While nonresident hunters may be harmed by Rule 12-4-114(E) to the extent they face a barrier that resident hunters do not face in their ability to engage in recreational hunting in Arizona and to derive any potential profit from this activity (i.e., to sell the antlers and hide of any harvested animals), interstate commerce in these markets is not burdened to any degree. To the extent an interstate market exists for

elk and deer antlers and hides, Arizona places no restrictions on the free trade of these products within or outside the state.

Even if Rule 12-4-114(E) placed some incidental burden on interstate commerce, which the court does not believe it does, Defendants would be entitled to summary judgment on Plaintiffs' Commerce Clause claim because Plaintiffs have not demonstrated a genuine issue of fact as to why any such incidental burden "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970). In their memorandum in support of their cross-motion for partial summary judgment on the Commerce Clause claim, Defendants argue that Rule 12-4-114(E) serves the purpose of rewarding residents for their continued sacrifice and support of the Commission and its policies, the maintenance of big-game populations, and the preservation of hunting opportunities. Plaintiffs argue that these asserted purposes cannot even be considered for two reasons. First, these rationales for Rule 12-4-114(E) were not even suggested in the Concise Explanatory Statement to that regulation, and thus under Arizona law cannot be considered as a justification for the regulation. *See* Ariz. Rev. Stat. Ann. § 41-1036 (West 1999). Second, Defendants' support for these stated rationales is the affidavit of Michael Golightly, who admitted at his deposition that he was not on the Commission at the time the resident set-aside was promulgated and that he has no knowledge as to the purpose(s) served by that set-aside. Plaintiffs have in fact moved to strike Mr. Golightly's affidavit on that basis.

Even limiting Defendants to the purposes for the resident set-aside offered in the Concise Explanatory Statement and ignoring the affidavit of Mr. Golightly, the

court finds that Rule 12-4-114(E) serves a legitimate local purpose.[7] The Concise Explanatory Statement describes a survey showing that many residents perceived nonresidents to be receiving an unfairly large number of hunt permit-tags. It then explains that "the continued management of Arizona's big game is dependent on the continued support of Arizona residents. Even though nonresidents pay five times more than a resident for a deer tag or an elk nag, the bulk of the Department's revenue comes from residents." Read together, these two excerpts of the Concise Explanatory Statement of Rule 12-4-114(E) demonstrate that the purpose of that regulation was to maintain the support of Arizona's residents for the Commission and its management of Arizona's big game. The court, following the path of other courts before it, finds this purpose to be legitimate. *See Terk*, 655 F. Supp. at 214 (finding to be legitimate purpose for cap on nonresident access to hunting permits the favoring of residents in order to gain their support for conservation and game management programs); *DeMasters*, 656 F. Supp. at 25 (finding cap on nonresident access to hunting permits to be supported by legitimate purpose of favoring residents due to their sacrifices in preserving wildlife habitat); *see also Baldwin*, 436 U.S. at 389-90, 98 S. Ct. at 1863-64 (finding to be legitimate reason for State of Montana's differential licensing fees that residents had made sacrifices in economic development and thus their tax base in order to preserve wildlife).

[7] Having reached this conclusion, the court will deny as moot Plaintiffs' motion to strike Golightly's affidavit.

Given the fact that a legitimate purpose is served by Rule 12-4-114(E), the burden lay on Plaintiffs to show they could offer sufficient evidence that the incidental burdens on interstate commerce imposed by that regulation are clearly excessive in relation to the local benefits it serves. *See Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994). Plaintiffs have failed to make such a showing. In fact, as the court already noted, it fails to see any burden imposed by Rule 12-4-114(E) on interstate commerce. The only burden imposed by that regulation is on nonresident hunters in their quest to engage in hunting activities in Arizona and to reap any potential profit therefrom. As the court has already discussed, these activities do not constitute interstate commerce.

V. CONCLUSION

The court believes that Plaintiffs have standing to assert their Commerce Clause claim, and will therefore deny Defendants' motion for summary judgment on that basis. The court, however, concludes that Rule 12-4-114(E) of the Arizona Administrative Code does not discriminate against interstate commerce. The court further finds that this regulation does not impose any incidental burdens on interstate commerce, and that even if it did, these incidental burdens would not clearly outweigh the local benefits served by the regulation. Accordingly, the court will deny Plaintiffs' motion for partial summary judgment on their Commerce Clause claim and grant Defendants' cross-motion for partial summary judgment on that claim.

IT IS ORDERED denying Defendants' Motion for Summary Judgment Re: Standing, filed March 23, 2000 (doc. 86).

IT IS FURTHER ORDERED denying as moot Plaintiffs' Motion to Strike the Affidavit of Michael Golightly, filed May 30, 2000 (doc. 99).

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Partial Summary Judgment, filed January 31, 2000 (doc. 76).

IT IS FURTHER ORDERED granting Defendants' Cross-motion for Partial Summary Judgment Re: Commerce Clause, filed April 3, 2000 (doc. 90).

DATED this 14 day of September, 2000.

/s/ Robert C. Broomfield
Robert C. Broomfield
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LAWRENCE MONTOYA, FILIBERTO VALERIO, and CAROLE JEAN TAULMAN, Plaintiffs, v. DUANE R. SHROUFE, DENNIS MANNING, MICHAEL GOLIGHTLY, HERB GUENTHER, WILLIAM BERLAT, M. JEAN HASSELL and LINDA MELKER in their individual and official capacities, DEFENDANTS.	No. 98-0239-PHX-RCB THIRD AMENDED CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND DAMAGES

THIRD AMENDED
CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND DAMAGES

COME NOW Plaintiffs, by and through their undersigned counsel, and for their third amended complaint state:

THE PARTIES

1. Lawrence Montoya is an individual residing in Taos, New Mexico. Mr. Montoya is a professional hunter, guide and outfitter. Mr. Montoya has been licensed to work as a hunting guide in Arizona. He also hunts game, such as elk and antlered deer, for the meat and other commodities available from such animals. He has applied repeatedly and unsuccessfully for a permit-tag, a form of hunting license required in order to hunt bull elk and antlered deer in Arizona.

2. Filiberto Valerio is an individual residing in Taos, New Mexico. Mr. Valerio is a professional hunter, guide and outfitter. He is licensed to work as a professional hunting guide in Arizona, and other states. He also hunts game, such as elk and antlered deer, for the meat and other commodities available from such animals. He has applied repeatedly and unsuccessfully for a permit-tag, a form of hunting license required in order to hunt bull elk and antlered deer in Arizona.

3. Carole Jean Taulman is an individual residing in Taos, New Mexico. Mrs. Taulman earns her living in the hunting business. She also hunts game, such as elk and

antlered deer, for the meat and other commodities available from such animals. She has applied repeatedly and unsuccessfully for a permit-tag, a form of hunting license required in order to hunt bull elk and antlered deer in Arizona.

4. Duane R. Shroufe ("Shroufe") is the Director of the Arizona Game and Fish Department. He is sued in his official and individual capacities. At all times material hereto, he was acting under the color of state law and within the scope and course of his duties and authority.

5. Dennis Manning ("Manning") is a member of the Arizona Game and Fish Commission. He is sued in his official and individual capacities. At all times material hereto, he was acting under the color of state law and within the scope and course of his duties and authority.

6. Michael Golightly ("Golightly") is a member of the Arizona Game and Fish Commission. He is sued in his official and individual capacities. At all times material hereto, he was acting under the color of state law and within the scope and course of his duties and authority.

7. Herb Guenther ("Guenther") is a member of the Arizona Game and Fish Commission. He is sued in his official and individual capacities. At all times material hereto, he was acting under the color of state law and within the scope and course of his duties and authority.

8. William Berlat ("Berlat") is a member of the Arizona Game and Fish Commission. He is sued in his official and individual capacities. At all times material hereto, he was acting under the color of state law and within the scope and course of his duties and authority.

9. M. Jean Hassell ("Hassell") is a member of the Arizona Game and Fish Commission. She is sued in her official and individual capacities. At all times material hereto, she was acting under the color of state law and within the scope and course of her duties and authority.

10. Linda Melker ("Melker") is an employee of the Arizona Game and Fish Department. She has been identified by Defendants' counsel as the the systems and programming manager with direct and personal responsibility for the operation of the computer programming functions which effect the quota on nonresident permit-tags further described below. She personally implements those programs or supervises those subordinate employees who do. She is sued in her official and individual capacities. At all times material hereto, she was acting under the color of state law and within the scope and course of her duties and authority.

11. Defendants are sued in their official capacities for declaratory, injunctive and other equitable relief. Defendants are sued in their individual or personal capacities for monetary damages.

VENUE AND JURISDICTION

12. This action is brought pursuant to 42 U.S.C. § 1983 and the Commerce and Privileges and Immunities Clauses of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

13. The Court has subject matter jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 1343.

14. The Court has personal jurisdiction over the parties.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) as all Defendants reside in Arizona.

ALLEGATIONS COMMON TO ALL COUNTS

A. THE INTERSTATE COMMERCE OF HUNTING

16. The business of hunting is a matter of interstate commerce. Over 14 million Americans each year engage in some form of hunting. Over 2 million Americans annually travel to states other than their home state in order to hunt. Hunting contributes $50 billion annually to the national economy and supports more than 690,000 jobs. There are more than 1,100 manufacturers, 100 distributors and 10,000 American retailers whose business is totally or largely dependent on the hunting market.

17. The business of professional hunting services is a matter of interstate commerce. From licensing, consulting, guiding and outfitting fees, professional hunting services generate revenues of several hundred million dollars a year and thousands of jobs.

18. Through contributions of conservation organizations and projects, excise taxes on hunting equipment, and purchases of licenses, stamps, tags and permits, hunters contribute more than $1 billion annually specifically for wildlife management and conservation. Sportsmen contribute more than 75% of every dollar spent for wildlife programs in the United States.

B. HUNTING IS A MEANS OF GAINING ACCESS TO A NATURAL RESOURCE LOCATED IN ARIZONA.

19. Bull elk and antlered deer are natural resources located in Arizona.

20. Several commodities of economic value can be obtained from bull elk and antlered deer, such as the meat, hide, ivories and particularly the antlers. The antlers can have a substantial economic value ranging from several hundred to several thousands of dollars. Quality racks of antlers appreciate in value over time. Antlers from a legally hunted bull elk and deer may be bought and sold and exported from Arizona to other states. There exists a national market for such antlers from bull elk and deer and the articles that are made from them.

21. Acquiring bull elk and antlered deer in Arizona through hunting is a matter of interstate commerce. Hunting in accordance with Arizona game laws is the only legal means of access to these natural resources.

22. Plaintiffs Montoya, Valerio and Taulman, desire to hunt bull elk and antlered deer in Arizona in order to acquire the products and commodities which may be obtained from the animals.

C. ARIZONA'S BURDENS ON THE INTERSTATE COMMERCE OF HUNTING

23. Bull elk and antlered deer in Arizona may not legally be hunted without a valid permit-tag issued by the Department. Further, no elk or antlered deer, or part thereof, may legally be exported from Arizona unless the

animal has been taken pursuant to a valid hunting permit-tag issued by the Department.

24. A.A.C.R. 12-4-114.E., a regulation which governs the issuance of permit-tags in Arizona, creates a quota on nonresident access to permit-tags for bull elk and antlered deer:

> No more than 10% of the total available hunt permit-tags shall be issued to nonresidents for the following hunts, except that when hunt numbers have 10 or less available hunt permit-tags, no more than 1 hunt permit-tag shall be issued to a nonresident:
>
> 1. All hunts for bull elk;
> 2. All hunts for antlered deer north of the Colorado River.

25. The quota on antlered deer permit-tags for that area north of the Colorado River is significant and of great detriment to Plaintiffs and other nonresidents because that population of antlered deer is of the highest quality of any population in Arizona. Upon information and belief, the quota on nonresident access to the antlered deer north of the Colorado River exists specifically because of the quality of those animals.

26. Defendants administer, implement, and enforce, and have directed persons under their control, direction and supervision to administer, implement and enforce, the quotas established by A.A.C.R. 12-4-114.E.

27. Defendants annually administer, implement and enforce the quotas on nonresidents personally and by directions and instructions to their subordinates and agents. Upon information and belief, Defendants' actions include, but are not limited to, approving advertising and

notices of the quota, putting off nonresidents objecting to the quota and demanding greater access to permit-tags, supervising or issuing directions to the employees who conduct the ministerial work to enable the drawing of permit-tags and approving and ratifying their work in implementing the quota. As a direct and foreseeable consequence of Defendants' actions, Plaintiffs have been injured as described below, and continue to be injured because Defendants deny them the same access to bull elk and antlered deer that they permit Arizona residents to enjoy.

28. The actual, historic level of demand by nonresidents for hunting bull elk and mule deer in Arizona exceeds the artificial 10% limits imposed by A.A.C.R. 12-4-114.E. and administered, implemented and enforced by Defendants.

29. The level of demand by nonresidents for hunting bull elk and mule deer in Arizona has also been artificially depressed and reduced in that nonresidents have been deterred from seeking permit-tags in Arizona because of the extreme difficulty nonresidents face in drawing a permit-tag and the unfairness of the Arizona system for allocating permit-tags.

30. In addition to the 10% nonresident quotas administered, implemented and enforced by Defendants, other policies and programs, including but not limited to the so-called "Bonus Point System," have been administered, directed and enforced by Defendants, or persons acting under Defendants' direction, supervision and control, which further reduce the number of permit-tags available to nonresidents. As the result of these other programs, nonresidents actually draw less than 7% of the

total permit-tags for bull elk. As of the time of the filing of this amended complaint, Defendants are just beginning to implement the programs for antlered deer and the effects appear to be similar.

31. No limit is placed on the percentage of permit-tags for bull elk and antlered deer which residents may draw, i.e, while nonresidents are restricted to "no more than" 10% of the available permit-tags, residents can draw the full 100% of the available permit-tags to the exclusion of nonresidents. Residents are thus permitted to compete for the limited permit-tags available to nonresidents, but nonresidents are restricted to competing among themselves for no more than 10% of the available permit-tags. This further reduces nonresident access to permit-tags.

32. But for the discriminatory treatment of nonresidents and the unequal and unreasonable burdens placed upon them in applying for permit-tags, nonresidents would apply in greater numbers and would draw many more permit-tags than they do under the existing discriminatory quotas.

33. Nonresident hunters, by the mere fact of their residency in a state other than Arizona, are not the source of any particular evil which may be legitimately and properly regulated by the State of Arizona so as to exclude them from fair and equal access to bull elk and antlered deer.

34. In order to build their businesses and engage in their trade as professional guides and outfitters, Montoya, Valerio and Taulman must be able to hunt bull elk and antlered deer in Arizona. Arizona residents who work in the same industry enjoy a competitive advantage because they are able to obtain permit-tags, successfully pursue

and hunt the animals, display their trophies, recount their experiences and thereby promote and advertise their business and its track record in Arizona. The ability actually to engage in hunting also allows Arizona residents to gain an advantage in knowledge of the country, the behavior and location of the animals and acquire the skills necessary to provide the quality services which will attract customers and fetch higher prices. Plaintiffs Montoya, Valerio and Taulman have suffered and continue to suffer competitive disadvantages in their industry solely because of their residency outside Arizona.

35. The restrictions and burdens placed upon nonresident access to permit-tags for bull elk and antlered deer serve no wildlife conservation purpose, nor any other legitimate state purpose.

36. The purpose for the regulations administered, implemented and enforced by Defendants which limit nonresident access to bull elk and antlered deer is to protect Arizona residents from competition by nonresidents in access to this natural resource and the commodities and articles of commerce which may be obtained from these animals, and to give Arizonans in the guiding and outfitting industry an advantage in competing with nonresidents.

37. As the result of the aforesaid discrimination against nonresidents, Plaintiffs Montoya, Valerio and Taulman have been subjected to an unfair and discriminatory system for allocating access to bull elk and antlered deer, to their detriment and loss.

38. As the result of the aforesaid discrimination against nonresidents, Plaintiffs Montoya, Valerio and Taulman have sustained injuries to their business and

occupations in that they have been deprived of the ability to service the actual demand of their customers and the national market for hunting bull elk and antlered deer in Arizona, and have suffered at competitive disadvantage to Arizona competitors. The restrictions on nonresident access to bull elk and antlered deer in Arizona have caused them to lose clients and income, have caused them economic damage and have prevented them from growing their businesses and clientele with respect to hunting Arizona bull elk and deer.

COURT I

(VIOLATION OF THE COMMERCE CLAUSE)

39. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 38, inclusive, as though fully restated herein.

40. As the regulation denying nonresidents access to any more than 10% of the available permit-tags for bull elk and the best antlered deer discriminate on their face against nonresidents in access to a natural resource and a commodity of economic value, it is *per se* unconstitutional and illegal.

41. Alternatively, even if the 10% quotas are not found to be facially discriminatory and per se illegal, when considered together with the discriminatory effects of the Bonus Point system, these regulations violate the Commerce Clause because the burden they impose on interstate commerce outweighs any legitimate local benefits.

42. The restrictions on nonresident access to permit-tags violate the Commerce Clause of the United States Constitution, and Plaintiffs' clearly established rights

thereunder as guaranteed and protected by 42 U.S.C. § 1983. *See Dennis v. Higgins,* 498 U.S. 439 (1991) (individual cause of action exists for violation of Commerce Clause rights).

43. Plaintiffs Montoya, Valerio and Taulman have suffered economic injuries and losses as a direct and foreseeable result of the violation of their rights. As the result of the restriction on nonresident access to permit-tags these Plaintiffs have not been able to hunt for valuable elk and deer and have lost customers, income, profits, and have otherwise sustained economic damage. Further, the illegal quotas have frustrated hunters and potential customers so as to deter them from even seeking to hunt in Arizona, thus depriving Plaintiffs of even more customers and income.

WHEREFORE Plaintiffs pray this Court (1) to declare the restrictions on nonresident access to permit-tags unconstitutional and illegal and to declare them null and void; (2) to enjoin Defendants from acting, or from directing persons under their control or supervision to act, to enforce the restrictions on nonresident access to permit-tags or to deny nonresidents equal access to the permit-tags; (3) to award Plaintiffs Montoya, Valerio and Taulman their damages and losses, plus pre- and post-judgment interest as permitted by law; (4) to award Plaintiffs their costs and attorney fees pursuant to 42 U.S.C. § 1988; and (5) to grant Plaintiffs such other and further relief to which they may in law or equity be entitled.

COUNT II

(VIOLATION OF PRIVILEGES AND IMMUNITIES CLAUSE

44. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 43 inclusive, as though fully restated herein.

45. Plaintiffs Montoya, Valerio and Taulman are engaged in the occupation and business of hunting.

46. In connection with their occupation and business, Plaintiffs Montoya, Valerio and Taulman have unsuccessfully sought access to bull elk and antlered deer in Arizona. It is reasonably anticipated that they will also in the future require access to bull elk and antlered deer in Arizona in the pursuit of their occupations and businesses.

47. The restrictions on nonresident access to permit-tags discriminate against Plaintiffs Montoya, Valerio and Taulman and disadvantage them in the pursuit of their occupations and businesses for no reason except that they reside in a state other than Arizona.

48. Defendants' conduct violates Plaintiffs' clearly established rights under the Privileges and Immunities Clause of the United States Constitution as protected and guaranteed by 42 U.S.C. § 1983. *See Root, et al. v. Shroufe,* No. 92-1481 PHX PGR (decision by Judge Rosenblatt declaring Arizona restrictions on nonresident hunting guides to be violation of Privileges and Immunities Clause. This decision has collateral estoppel, or res judicata effect on this issue as respects Defendant Shroufe, who was a party to the prior litigation with nonresident guides and outfitters).

49. As a direct and foreseeable result of the violation of their rights, Plaintiffs have been damaged and have suffered lost income and profits.

WHEREFORE Plaintiffs pray this Court (1) to declare the restrictions on nonresident access to permit-tags unconstitutional and to declare them null and void; (2) to enjoin Defendants from acting, or from directing persons under their control or supervision to act, to enforce the restrictions on nonresident access to permit-tags or to deny nonresidents equal access to the permit-tags; (3) to award Plaintiffs Montoya, Valerio and Taulman their damages and losses, plus pre- and post-judgment interest as permitted by law; (4) to award Plaintiffs their costs and attorney fees pursuant to 42 U.S.C. § 1988; and (5) to grant Plaintiffs such other and further relief to which they, may in law or equity be entitled.

COUNT III (DENIAL OF EQUAL PROTECTION)

50. Plaintiffs incorporate herein by reference the allegations of paragraphs I through 49, inclusive, as though fully restated herein.

51. The regulations enforced by Defendants deprive Plaintiffs of their right to equal protection under the law with respect to the allocation of permit-tags and access to bull elk and antlered deer.

52. The regulations enforced by Defendants which discriminate against Plaintiffs in access to bull elk and antlered deer violate Plaintiffs' constitutional rights as guaranteed by the Fourteenth Amendment to the United States Constitution, and as protected by 42 U.S.C. § 1983.

53. As a direct and foreseeable consequence of the violation of their constitutional rights, Plaintiffs have suffered losses and injuries for which they should be compensated.

WHEREFORE Plaintiffs pray this Court (1) to declare the restrictions on nonresident access to permit-tags unconstitutional and to declare them null and void; (2) to enjoin Defendants from acting, or from directing persons under their control or supervision to act, to enforce the restrictions on nonresident access to permit-tags or to deny nonresidents equal access to the permit-tags; (3) to award Plaintiffs Montoya, Valerio and Taulman their damages and losses, plus pre- and post-judgment interest as permitted by law; (4) to award Plaintiffs their costs and attorney fees pursuant to 42 U.S.C. 5 1988; and (5) to grant Plaintiffs such other and further relief to which they may in law or equity be entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

I hereby certify that I served a true and correct copy of the foregoing by U.S. mail, postage prepaid, upon:

Michael Warzynski
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007

this 5th day of July, 1999.

/s/ James R. Scarantino

Compilation of State Statutes and Regulations Limiting Nonresident Participation in Hunting of Big Game

Alaska

Alaska has a statutory preference for residents in the taking of moose, deer, elk and caribou, Alaska Stat. §16.05.255(d)(Michie 1999), and the legislature has authorized the Board of Game to restrict nonresidents through a permit system whenever deemed necessary in order to maintain resident opportunities for taking game. Alaska Stat. § 16.05.265. Alaska by regulation permits the purchase, sale or barter of game or any part of game except as specifically provided by regulation. 5 Alaska Admin. Code § 92.200. Alaska regulation prohibits sale of the meat of big game and small game except hares and rabbits, permits the barter of caribou in Game Management Units 22-26 if not transported or exported from those units, and permits the sale of a skin or trophy by a licensed taxidermist, executor or referee in bankruptcy. Id., §92.200.

California

California by regulation limits to residents issuance of license tags for pronghorn antelope and elk. Cal. Code Regs., title 14, §§ 363, sub(k)(1), 364, sub(I)(1). It is unlawful to sell deer meat and bear meat and parts, and the possession of any game outside its hunting season is limited to individuals possessing a valid hunting license or to charitable organizations to which the game has been donated. Id., §§ 4301, 4758, 3080.

Colorado

The Colorado Wildlife Commission by regulation allocates to nonresidents ten percent of available permits for Rocky Mountain bighorn sheep, desert bighorn sheep, mountain goat and moose. Colo. Code Regs. §§ 218A, 219A, 227A, 270D. Sale of game, including edible parts, is prohibited except as permitted by regulation. Colo. Rev. Stat. § 33-6-13. The sale of nonedible parts, except bear bladders, velvet antlers, sheep skulls and horns, is permitted by regulation. Comm'n Reg. #013.A.

Idaho

The Idaho Fish and Game Commission is authorized by statute to limit the number or prohibit entirely the participation by nonresidents in limited permit hunts. 21 Idaho Code § 36-408(2). The Commission by rule has limited to ten percent the number of nonresident permits in limited permit hunts. IDAPA 13.01.08260.02. The sale of edible parts of lawfully harvested game is prohibited by statute, Idaho Code § 36-501, while the sale of nonedible parts is permitted.

Illinois

Illinois limits the number of nonresident archery deer permits in its unlimited archery deer hunt. 17 Ill. Admin. Code 670.20. The sale of edible parts of game is prohibited, 520 Ill. Comp. Stat. 5/2.29, but inedible parts of game mammals may be sold if legally taken. 520 Ill. Comp. Stat. 2.36.

Iowa

Iowa by statute limits the number of nonresident deer and turkey permits. Iowa Code §§ 483A.7, 483A.8. Edible portions of big game may not be sold, except that edible game may be sold by a nonprofit corporation as part of a "game feed." Iowa Code § 481A.55. Certain nonedible portions of an animal may be sold including skins, plumage and antlers of legally taken game. Iowa Code § 481A.55.

Kansas

Kansas by statute imposes a ten percent limit on the number of nonresident deer permits for firearms and a fifteen percent limit on nonresident deer permits in its archery deer hunt. Kan. Stat. Ann. § 32-937(m)(1), (m)(2). By administrative regulation, Kansas prohibits the sale of edible parts of game animals, but permits the sale of inedible parts. Kan. Admin. Reg. 115-17-15.

Kentucky

Kentucky by regulation limits to ten percent the number of nonresident permits in the hunting of elk. Ky. Admin. Regs. 301-2:132. The sale of edible parts of wildlife lawfully taken is prohibited, Ky. Rev. Stat. Ann. § 150.180(1), while inedible parts of wildlife may be bought and sold in transactions involving a licensed taxidermist. Ky. Rev. Stat. Ann. §§ 150.411, 150.4111.

Maine

Maine by statute limits to not more than ten percent the number of permits that may be issued to nonresident and

alien hunters in connection with hunting of moose and turkey, 12 Me. Rev. Stat. Ann. §§ 7463A(4), 7468(4), and limits to not more than fifteen percent the number of permits that may be issued to nonresident and alien hunters in hunting antlerless deer. 12 Me. Rev. Stat. Ann. § 7457(H)(4)(b). Edible parts of moose, deer and turkey may not be sold. 12 Me. Rev. Stat. Ann. §§ 7464(8)(A), 7458(3)(A), 7469(9)(A). The head, antlers, bones, feet and hide of a moose lawfully taken may be sold. 12 Me. Rev. Stat. Ann. 7464(9)(A). The head, antlers, feet and hide of a deer lawfully taken may be sold. 12 Me. Rev. Stat. Ann. 7458(15)(A).

Michigan

Michigan by regulation authorizes the Director of the Department of Natural Resources to establish a limit on the number of bear kill tags that may be issued to nonresidents. For the 2002 bear season, the Director authorized a limit of two percent. The sale of edible parts of big game (deer, bear, elk, moose and wild turkey) and the teeth, claws, flesh, bones or internal organs other than certain species may not be sold. The antlers of deer, elk and moose and the skull of black bear lawfully taken may be bought or sold.

Minnesota

Minnesota by statute issues to residents only licenses for hunting of moose and elk. Minn. Stat. § 97A.475 subds. 1-3. The sale of wild animals, including edible parts, is prohibited except that the sale of inedible parts of lawfully taken wild animals mounted specimens, tanned hides, dressed furs, bones including skulls, sinews, hides and

skin, hooves, teeth, claws and antlers of wild animals lawfully taken. Minn. Stat. §§ 97A.501 subd. 1, 97A.505 subd.7, 97A.512.

Missouri

Missouri by regulation limits to residents permits in certain limited quota deer management units. 3 Mo. Code Regs. 10-7.435 (2002). Edible parts of big game may not be sold. Id., 10-10.767 (2002), while legally obtained feathers, squirrel pelts, rabbit pelts, turkey bones, turkey heads and the heads, antlers, hides and feet of lawfully taken deer may be sold. Id., 10.768.

Montana

Montana by statute limits to ten percent the number of big game hunting licenses or permits that may be issued to nonresidents when the number of applications exceed the number of licenses or permits to be issued. Mont. Code Ann. 87-2-506(2). The sale of edible parts of lawfully taken big game is prohibited. Mont. Code Ann. 87-3-111(1), (3). The sale of hides, heads or mounts of a lawfully killed game animal, except grizzly bears, is permitted as well as the bones of a lawfully killed elk or deer. Mont. Code Ann. 87-3-111(2)(b),(d).

Nebraska

Nebraska by statute limits permits for bighorn sheep and elk to residents. The limitation concerning elk is set forth at Neb. Rev. Stat. § 37.450. The sale of meat or flesh of game animals is prohibited, but the hides, hair, hooves,

bones, antlers, and horns of antelope, deer or elk may be sold. Neb. Rev. Stat. § 37-505.

Nevada

The Wildlife Commission is authorized to limit nonresident hunting and does so in annual regulations for hunting of pronghorn antelope, black bear, mule deer, mountain goat, mountain lion, Nelson, California and Rocky Mountain bighorn sheep and Rocky Mountain elk. Nev. Rev. Stat. § 501.003. Sale of edible parts of big game is prohibited, while the sale of the hide, head, antlers, horns and other inedible parts of game animals legally killed is permitted. Nev. Admin. Code § 503.174.

New Hampshire

New Hampshire by regulation limits the number of moose permits for nonresidents to not more than a percentage of available permits that is the percentage that licenses sold to nonresidents bears to the total number of nonresident hunting licenses sold. N.H. Code Admin. R. Ann. Fis 301.09(I)(2)(f). The sale of edible parts of big game is prohibited; the sale of heads, hide and feet of deer, moose and bear is permitted. N.H. Rev. Stat. 208.11.

New Mexico

New Mexico by statute limits to twenty-two percent (twelve percent for guided nonresidents and ten percent for unguided nonresidents) the number of permits that may be issued to nonresidents in limited permit hunts on public land. N. M. Stat. Ann. 17-3-16. Edible parts of lawfully taken big game may be donated but not sold while

skins, heads, antlers, horns or claws of protected game and feathers of non-migratory birds may be bartered or sold. N. M. Stat. Ann. 17-2-7; N. M. Admin. Code 19.31.10.9.

North Dakota

North Dakota by statute limits the number of nonresident licenses to one percent of the available licenses in the initial lottery for the deer gun hunt, N.D. Cent. Code § 20.1-03-11-4, and limits nonresident mule deer archery licenses to a number equal to fifteen percent of the previous year's total gun licenses for mule deer. Id., § 20.1-03-11-10. By statute, nonresident licenses for moose, elk, bighorn sheep, pronghorn antelope and turkey are not available. The sale of big game animals is prohibited, Id., § 20.1-05-02, and the sale of nonedible parts of lawfully taken wildlife is not specifically prohibited.

Oregon

Oregon by statute limits the number of controlled hunt tags (mountain goat, mountain sheep, black bear, cougar, antelope, elk and deer) that may be issued to nonresidents. The number of nonresident mountain goat and nonresident sheep tags shall be decided by the Fish and Wildlife Commission, but the number of nonresident goat tags shall not be more than ten percent of all mountain goat tags issued and the number of nonresident mountain sheep tags shall not be more than ten percent of all mountain sheep tags issued. Or. Rev. Stat. § 497.112(7), (8), (9). The sale of edible wildlife parts from wildlife harvested by hunters is prohibited. Or. Admin. R. 635-200-0090. Sale of certain nonedible parts is permitted. Id., 635.200.

Pennsylvania

The Pennsylvania Game Commission has by regulation limited the number of elk licenses that may be issued to nonresidents to ten percent of the licenses drawn. 58 Pa. Code § 143.203(b). Sale of edible parts of game is prohibited, 34 Pa. Cons. Stat. § 2312(a) while nonedible parts of game may be sold by the original owner during the season in which the game was taken and within ninety days after close of the season. Id., § 2312(c). In addition, under permit issued by the Commission, the sale of a mounted trophy or tanned hide may be sold in a liquidation of assets where the original owner is deceased. 58 Pa. Code § 147.146.

South Dakota

South Dakota Game, Fish and Parks Department by regulation sets aside for nonresidents an addditional eight percent of the number of permits available to residents in the Black Hills and West River Prairie deer seasons, the spring turkey season, and for antelope. S. D. Admin. R. 41:06:19:02. The sale of edible parts of any big game animal is prohibited by statute, S. D. Codified Laws § 41-14-12, while the sale of skins, heads and antlers of any big game animal may be sold. Id., § 41-14-13.

Utah

Utah by proclamation of the Utah Wildlife Board limits to ten percent the number of permits available to nonresidents in limited permit hunts of big game. 2002 Utah Big Game Proclamation, 40-45. The sale of big game, including edible parts, is prohibited except that antlers, heads and horns may be sold between February 15 and August 8,

untanned hides may be sold between August 20 and February 15, and tanned hides and shed antlers or horns may be sold at any time. Utah Admin. Code § R657-5-24.

Vermont

Vermont by statute limits to ten percent the number of permits for antlerless deer issued to nonresidents in a lottery after issuance of permits to landowners. 10 Vt. Stat. Ann. § 4081(g)(2). The sale of big game, including the meat, is prohibited except during the open season and for twenty days thereafter. Id., 4783.

West Virginia

West Virginia by administrative rule approved by the legislature limits antlerless deer permits to residents in all counties that have a limited number of antlerless deer permits and limits licenses to hunt wild boar to residents. Sale of edible parts of game animals is prohibited except by licensed private game preserves for the purpose of propagating game for commercial purposes. W. Va. Code § 20-2-11. Sale of nonedible parts of game animals is prohibited except for the head, hide, feet and antlers of legally taken whitetail deer, the head, hide and skull of legally taken black bear, and pelts of game or furbearing animals taken during the legal season. Id., § 20-2-11.

Wisconsin

Wisconsin by statute establishes five preference categories for wild turkey licenses if the number of applications exceeds the number of available wild turkey licenses: a first preference for qualified resident landowners, a second

preference for resident applicants who applied for but were not issued a license in a previous season, a third preference for all other resident applicants, and a fourth preference for qualified nonresident landowners, and a fifth preference for all other nonresident applicants. Wis. Stat. § 29.164(3). A similar resident preference system of three categories is established by statute for special deer hunting. Id., § 29.173 (4),(5). Except as otherwise provided, sale of deer, bear, squirrel, game bird, game fish or the carcass of any such animal is prohibited at any time and sale of any other wild animal or its carcass is prohibited during the closed season for that animal. Id., § 29.539(1)(a). Tails and skin of any squirrel lawfully killed, when severed from the rest of the carcass, and the hide of any bear lawfully taken, if the hide includes the claws, head and teeth of the bear, may be sold. Id., § 29.539 (4), (5).

Wyoming

Wyoming by statute limits to twenty percent the number of licenses to hunt moose that may be issued to nonresidents and limits to twenty-five percent the number of nonresident licenses for bighorn sheep and mountain goat. Wyo. Stat. Ann. § 23-1-703(e). The Game and Fish Commission by regulation limits the percentage of resident permits available to nonresidents for elk, deer and antelope in limited quota areas. Id., § 23-1-703(g). The sale or barter of any edible portion of any game animal is prohibited. Id., 23-3-302. Sale of the nonedible parts of any big game animal lawfully taken is not prohibited.